JUN 20 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT DUNN,
Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

NO. 77-6949

PETITION FOR WRIT OF CERTIORARI

COMES NOW the above named appellant, through his court appointed counsel, Daniel J. Sears, Federal Public Defender for the District of Colorado, and for his Petition for Writ of Certiorari states to the Court as follows:

1. The appellant, Robert Dunn, was convicted on three (3) counts of a five-count indictment charging false declarations before a grand jury, in violation of Title 18, United States Code, Section 1623. The verdict was returned on April 14, 1977, and appellant was thereafter sentenced on May 23, 1977, to five (5) years imprisonment on Count II, and the same sentences on convictions for Counts III and IV, to run concurrent to one another. Appellant filed a timely Notice of Appeal and the matter was heard before the United States Court of Appeals for the Tenth Circuit. On June 5, 1978, the Tenth Circuit affirmed the conviction of the trial court. A copy of its Opinion is attached hereto.

2. The judgment sought to be reviewed was filed in the United States Court of Appeals for the Tenth Circuit on June 5, 1978. Jurisdiction is conferred on this Honorable Court to review said judgment by Writ of Certiorari under Title 28, United States Code, Section 1254(1).

3. The questions presented for review on appeal and by Writ of Certiorari are as follows:

Can declarations made before a federal grand jury under a grant of immunity pursuant to 18 U.S.C. §6002-6003, be used to establish the corpus delecti of an inconsistent declarations prosecution under Title 18, United States Code, Section 1623(c), without its first being established that the declarations under immunity were false, thereby violating the immunity order?

Can a proceeding in a private attorney's office before a local court reporter be deemed to be a proceeding ancillary to a U. S. Court or a federal grand jury proceeding in sustaining a conviction under 18 U.S.C. §1623(c)?

Can an admission by a witness before a federal district judge that 90 percent of his grand jury testimony was false be relied upon in sustaining a perjury conviction when the only theory presented to the trial court and jury was one of inconsistent declarations under Title 18, United States Code, Section 1623(c)?

4. This case involves the following citations of law:

Cases

Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972)

People v. Denson, 59 Ill.2d 546, 322 N.E.2d 464 (1975)

United States v. Alter, 482 F.2d 1016 (9th Cir. 1973)

United States v. Berardelli, 565 F.2d 24 (2nd Cir. 1977)

United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974) cert. den., 420 U.S. 925

United States v. Doe, 361 F.Supp. 226 (E.D. Penn., 1973) affirmed, 485 F.2d 682 (3rd Cir. 1973) cert. den., 415 U.S. 989

United States v. Housand, 550 F.2d 818 (2nd Cir. 1977)

United States v. Patrick, 542 F.2d 381 (7th Cir. 1976) cert. den., ___ U.S. ___

Statutes

Title 18 United States Code, Section 1621

Title 18 United States Code, Section 1623

Title 18 United States Code, Section 1623(a)

Title 18 United States Code, Section 1623(b)

Title 18 United States Code, Section 1623(c)

Title 18 United States Code, Section 1623(d)

Title 18 United States Code, Section 3503

Title 18 United States Code, Section 3503(d)

Title 18 United States Code, Section 3503(g)

Title 18 United States Code, Section 6001(4)

Title 18 United States Code, Section 6002

Title 18 United States Code, Section 6003

Other

United States Constitution, Fifth Amendment

U. S. Code Congressional and Administrative News, 1970 Session, Vol. II, pages 4008-4009

5. On December 15, 1976, appellant Robert Dunn was indicted on five counts of false declarations before a grand jury or court pursuant to Title 18 United States Code, Section 1623. The indictment alleged inter alia that Dunn had made sworn declarations before a federal grand jury on June 16, 1976, and subsequently, on December 30, 1976, had made sworn declarations before a court reporter in the office of a local attorney "in a proceeding ancillary to United States vs. Musgrave, et al., Criminal Case No. 76-CR-155." The indictment further alleged that the "aforesaid declarations . . . were inconsistent to the degree that one of said declarations was false and known by him to be false when made." On January 28, 1977, the defendant entered pleas of not guilty to all five counts. On March 10, 1977, the defendant filed a Motion for Bill of Particulars requesting that the government be ordered to set out "which declarations in paragraphs 4 and 5 of each count are inconsistent with each other, or, in the alternative, which of the statements alleged was false and known by the defendant to be false when made." In his Memorandum in Support of Motion for Bill of Particulars, the defense argued that it must be advised as to whether the government was proceeding on the theory that the declarations alleged were inconsistent to the degree that one was necessarily false, the theory authorized under subsection (c) of Title 18 U.S.C. §1623,

or alternatively, intended to prove that the defendant's June 16, 1976, grand jury declarations were false by showing the September 30, 1976, recantation before the local attorney. In the government's response to the Motion for Bill of Particulars, the prosecutor cited the legislative history for and the provisions under 1623(c), seemingly indicating its intent to proceed on an inconsistent declarations theory. The court, however, after hearing, denied the Motion for Bill of Particulars.

At the commencement of trial on April 13, 1977, the prosecutor in his opening statement used such phrases as "so logically and inherently inconsistent that one of the two times he had to be lying", "so inconsistent that he had to be lying at one of the two times", "two inconsistent statements, so inconsistent that you have to infer that one of them is false", "infer the falsity of one of the statements on the basis of their utter and complete inconsistency". It was thus clear that the theory of the prosecution was directed toward an inconsistent declarations theory provided for under 1623(c).

The government's first witness was the Clerk of the U. S. District Court for the District of Colorado, who identified the statement taken in the local attorney's office which had been admitted as an exhibit in U. S. v. Musgrave, et al. On cross-examination, the Clerk was asked to identify the use immunity orders compelling the appellant's testimony before the federal grand jury on June 16, 1976. (It should be noted that the appellant had claimed his Fifth Amendment privilege prior to entry of the immunity order.) The government next proceeded

to offer the immunized grand jury testimony and the subsequent recantation before the private attorney into evidence. The defendant objected on the basis that the immunized grand jury testimony could not be used in establishing the corpus delecti in an inconsistent declarations prosecution unless the government first showed that the immunity order had been violated and the defendant testified falsely before the grand jury, citing the Patrick case. The government next called a court reporter who indicated that he had taped appellant's statement in the local attorney's office on September 30, 1976. He, however, admitted on cross-examination that none of the deposition procedures provided in Title 18 United States Code, Section 3503 had been used in taking such statement. He conceded that Dunn had not been assured the right to the presence of an attorney, had not been advised of his rights as outlined in the statute, he had not given notice to any other parties in the proceeding, and had made no determination of Dunn's unavailability at any future proceedings in the pending criminal case.

At this juncture, it must be stated that as a result of Dunn's testimony before the federal grand jury, Phillip Musgrave and several other co-defendants were indicted for conspiracy to manufacture drugs. The government contended that the indictment resulted in part from Dunn's testimony. Dunn subsequently met Musgrave on the street and indicated that his testimony before the federal grand jury was false. Dunn, at Musgrave's insistence, accompanied Musgrave to his attorney's office whereafter Dunn recanted his grand jury testimony.

Defense counsel for the various co-defendants in the Musgrave case moved to dismiss the pending indictment on the grounds that it was based on perjured testimony. After hearing before the trial judge in the Musgrave case, the government negotiated reduced pleas, although the indictment was not dismissed.

After defendant's objections to the introduction of the affidavit taken in the local attorney's office and the immunized grand jury testimony were overruled and said documents were admitted, the government called the prosecutor who handled the grand jury investigation in U. S. vs. Musgrave, et al. He testified to the materiality of Dunn's testimony to the grand jury investigation. On cross-examination, however, the prosecutor indicated that there was no independent evidence to refute Dunn's grand jury testimony and in fact, much of the independent evidence corroborated it. The prosecutor further indicated that other than Dunn's own recantations, he was not aware of any independent evidence establishing the falsity of the federal grand jury testimony. Defense counsel cross-examined the prosecutor on each declaration Dunn had made before the federal grand jury and received indication that there was independent evidence to corroborate the greater majority of it. The government subsequently offered a transcript of testimony by appellant in a hearing in United States v. Musgrave, et al., on October 21, 1976. This was the testimony presented by counsel for the co-defendants in the Musgrave case to seek dismissal of the pending indictment. Defense counsel objected on the grounds that the statements or declarations made by Dunn in the October 21, 1976, pro-

ceedings were not set out as inconsistent declarations in the indictment; and further, that such statements had not been supplied by the government as required by Rule 16 of the Federal Rules of Criminal Procedure. The objections were overruled and the government closed its case. The defense moved for a judgment of acquittal relying on United States v. Patrick, 542 F.2d 381 (7th Cir. 1976), holding that immunized testimony, to wit: Dunn's federal grand jury testimony, could not be used to establish the corpus delecti in an inconsistent declarations prosecution and further, that the statement taken in the local attorney's office could not be considered an inconsistent declaration in a proceeding before or ancillary to a federal court or grand jury, as required under 18 U.S.C. §1623(c). The government countered that the statement to the local attorney could be considered ancillary to a U. S. court proceeding because said attorney was representing a defendant in a pending matter in U. S. District Court. The defense countered that Section 1623 simply could not be stretched that far. The prosecutor once again affirmed that he was proceeding on an inconsistent declarations theory. Relying on said representation, the defense discharged its subpoenaed witnesses which were called to prove the truth of the grand jury testimony. The jury was instructed that the government need not prove which of the declarations was false, but that the defendant made "irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to a court or grand jury." In its decision affirming appellant's conviction

in the United States Tenth Circuit Court of Appeals, the appellate court affirmed Dunn's position that the proceedings in the local attorney's office could not be deemed to be a proceeding ancillary to a U. S. Court or federal grand jury proceeding. The Tenth Circuit, however, affirmed the conviction on the basis of Dunn's statements in the October, 1976, proceeding, admitting that his grand jury testimony was false. However, as pointed out in appellant's Petition for Rehearing, Dunn's statements in the October, 1976, proceeding were as follows:

"Q Was what you told the grand jury true?

A No, sir.

Q Was any part of it true?

A Possibly ten percent."

Appellant contends that this admission before a federal judge cannot be used as an inconsistent declaration in a proceeding under 18 U.S.C. §1623(c). The falsity of the federal grand jury testimony was never before the court and was never presented to the jury as a prosecution theory. The trial jury rendered a verdict solely on the basis of inconsistent declarations; one said declaration having been made before a grand jury, the other in a taped recording in a local attorney's office. Appellant argued that such decisions as United States v. Patrick, 542 F.2d 381 (7th Cir. 1976), United States v. Housand, 550 F.2d 818 (2nd Cir. 1977), United States v. Berardelli, 565 F.2d 24 (2nd Cir. 1977), could not on the one hand sustain the theory that a witness could not be prosecuted for inconsistent declarations thus being compelled

to testify in a grand jury or court proceeding and on the other, subject him to inconsistent declarations prosecution by the use of immunized grand jury testimony in establishing the corpus delicti. Though the Tenth Circuit did not overrule said three cited cases, it did not render a decision in Dunn that could be deemed consistent with Patrick, Housand or Berardelli. Appellant argued that the government simply could not have it both ways. During the proceedings before the federal judge on October 21, 1976, seeking to dismiss the indictment, no attorney sought to take each specific declaration that Dunn had made before the federal grand jury and determine its inconsistency for the court. Such testimony was not and could not have been presented as inconsistent declarations since no declarations inconsistent with the federal grand jury testimony were presented; only an admission that ten percent of the statements before the federal grand jury were true. Appellant's Petition for Rehearing is still pending before the Tenth Circuit Court of Appeals.

6. The basis of federal jurisdiction in the first instance was that the appellant was charged in the District of Colorado with a violation of Title 18 United States Code, Section 1623.

7. The appellant argues for allowance of a Writ of Certiorari on the basis that the government's reliance on immunized testimony in establishing the corpus delicti in an inconsistent declarations prosecution cannot be sustained. To compel the defendant on the one hand to testify truthfully under an order of immunity thereby setting aside his Fifth

Amendment claim, but on the other hand, prosecuting him for inconsistent declarations without proving a violation of the immunity order is a violation of due process and his Fifth Amendment privilege. Until and unless the government proved that he testified falsely before the federal grand jury, it could not use his grand jury testimony to establish the corpus delicti in an inconsistent declarations prosecution. To do so, the Tenth Circuit Court must overrule the Patrick, Housand and Berardelli decisions. The Tenth Circuit, though not overruling said decisions, never explained how the government accomplished its conviction without violating the reasoning contained in those opinions. Further, the appellate court cannot sustain a conviction based on the government's use of an admission that grand jury testimony was false when the trial jury was told that the falsity of the federal grand jury testimony was not at issue. Such a conviction certainly cannot be sustained in light of the admission by the government that all the independent evidence pointed to the truthfulness of the federal grand jury testimony.

Based on the above circumstances, this Honorable Court is urged to grant a Writ of Certiorari so that it may review the conviction of the appellant below.

Respectfully submitted,

DANIEL J. SEARS
Federal Public Defender

United States Court of Appeals
TENTH CIRCUIT
OFFICE OF THE CLERK
469 UNITED STATES COURTHOUSE
DENVER, COLORADO 80294

TELEPHONE
303-837-3157

HOWARD K. PHILLIPS
CLERK

June 5, 1978

Mr. Daniel J. Sears
Federal Public Defender
P. O. Drawer 3605
Denver, Colorado 80294

Re: No. 77-1398
U.S.A. v. Robert Dunn

Dear Mr. Sears:

Enclosed is a copy of the Court's opinion in the captioned case. Judgment has been entered today in accordance with the opinion.

Very truly yours,

Howard K. Phillips

HOWARD K. PHILLIPS
Clerk

bmt

Enclosure

cc: Honorable Sherman G. Finesilver
Joseph F. Dolan, U. S. Attorney; Edward W. Nottingham, Asst. U. S. Attorney, 323 U. S. Courthouse, Denver, Colorado 80294
Robert Dunn, c/o Federal Public Defender

FILED
United States Court of Appeals
Tenth Circuit
JUN 5 1978
HOWARD K. PHILLIPS
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
ROBERT DUNN,
Defendant-Appellant.

NO. 77-1398

FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. NO. 76-CR-322)

Daniel J. Sears, Federal Public Defender, on the brief for appellant.
Edward F. Nottingham, Asst. U. S. Attorney, (with Joseph F. Dolan, U. S. Attorney, on the brief) for appellee.

Before BARRETT, DOYLE, LOGAN, Circuit Judges

BARRETT, Circuit Judge

Robert Dunn appeals from his conviction of making false statements before a grand jury in violation of 18 U.S.C. §1623.

FACTUAL BACKGROUND:

In June 1976, under a grant of immunity pursuant to 18 U.S.C. §6002, Dunn presented testimony to a grand jury investigating illegal drug activity in the Colorado State Penitentiary. Dunn's testimony implicated Phillip Musgrave in the crimes under investigation. Following the grand jury proceeding, Musgrave and others were indicted on charges of conspiring to manufacture and distribute controlled substances. (United States v. Musgrave, et al, No. 76-Cr-155.)

Subsequently, in September 1976, Dunn appeared in the office of Michael Canges, attorney for Phillip Musgrave. In the presence of Canges and Gerald Cohen, a notary public, Dunn gave an oral statement under oath which was recorded and transcribed wherein he recanted his grand jury testimony implicating Musgrave. (Vol.I at 74-83; Vol.II at 144-147). Dunn stated that much of what he had previously told the grand jury was not true. (Vol. I at 68-73). At the time Dunn made the statement, he was not represented by counsel. However, there is nothing in the record which indicates that Dunn could not have appeared with counsel or that his statement was not completely voluntary. Dunn was fully cognizant that Canges was representing Musgrave.

Thereafter, Michael Canges notified the United States Attorneys' office of Dunn's recantation of his grand jury testimony. Canges filed a transcript of Dunn's sworn statement with the district court wherein the Musgrave prosecution was pending. Motions were filed on behalf of Musgrave and others challenging the indictments on the basis that such indictments had been returned predicated on false grand jury testimony. An evidentiary hearing on these motions was held before Judge Winner in October 1976. At that time Dunn, who was then represented by counsel, reaffirmed under oath that he had lied to the grand

jury. His testimony of course, was duly reported and transcribed. As a result, the charges against Musgrave were subsequently reduced.

Thereafter, Dunn was indicted and charged with five counts of making false statements to a grand jury in violation of 18 U.S.C. §1623. The evidence against Dunn admitted at trial included: Dunn's grand jury testimony, Dunn's Canges statement, and relevant portions of Dunn's testimony at the Musgrave motion hearing. At Dunn's trial, testimony was given by the notary public who had administered the oath to Dunn in Canges' office, and by the United States Attorney in charge of the grand jury proceeding. The jury found Dunn guilty on three counts of perjury before the grand jury.

On appeal Dunn contends that the trial court erred in 1) ruling that the proceeding in Canges' office was a proceeding ancillary to a court or grand jury of the United States, and 2) ruling that immunized grand jury testimony could be used to establish the corpus delecti in an inconsistent declarations prosecution.

PRELIMINARY DISCUSSION:

Before proceeding to the specific issues at hand, it is necessary to discuss in some detail the pertinent statutes and the indictment as drafted against Dunn, as such have a significant bearing upon the specific issues raised on appeal.

18 U.S.C. §1623, captioned "False Declarations Before a Grand Jury or Court" provides that:

> "(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information . . . knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 U.S.C. §1623(c), outlines a statutory method of charging a witness with violating §1623(a):

"(c) An indictment or information for violation of this section alleging that in any proceeding before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false need not specify which declaration is false . . ."

In addition, §1623(c) sets forth a method for proving false declarations:

"In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury."

Thus, §1623(c) eliminates the two witness rule which is otherwise required to prove perjury. The government need not prove which of the declarations was false through extrinsic evidence, but rather, the falsity of one of the two declarations is inferred from their inconsistency with each other. United States v. Slawik, 548 F.2d 75 (3rd Cir.1977); United States v. Patrick, 542 F.2d 381 (7th Cir.1976), cert. denied 430 U.S. 931.

Turning now to the government's indictment of Dunn, all counts of the indictment read that:

"On June 16, 1976, at Denver in the District of Colorado, ROBERT DUNN, while under oath as a witness in a proceeding before a grand jury of the United States in the District of Colorado, did knowingly make a false material declaration . . . in violation of Title 18, U.S.C. §1623."

The indictment quotes the appropriate portions of Dunn's initial grand jury testimony from a certified transcript wherein Dunn made statements implicating Musgrave. The indictment also quotes statements contradicting Dunn's grand jury testimony made in Canges' office. The concluding portion of each count against Dunn included this language:

"6. The aforesaid declarations by ROBERT DUNN, as set forth in paragraphs (4) and (5) of this count were

inconsistent to the degree that one of said declarations was false and known by him to be false when made."

In the preliminary stages of the proceedings below, Dunn moved for a bill of particulars to determine which statements the government intended to prove were false. The need for clarification is obvious. As quoted above, each count of the indictment specified that during Dunn's appearance before the grand jury in June, 1976 he knowingly made false material declarations. On the other hand, the concluding portion of each count indicated that the government was relying on 18 U.S.C. §1623(c), where, as explained above, inconsistencies between Dunn's grand jury testimony and Dunn's Canges statement would be sufficient to prove the falsity of one or the other of them.

In response to Dunn's request for a bill of particulars, the government claimed to rely upon §1623(c). The government and Dunn proceeded upon this theory of the case. For example, Dunn's counsel properly concluded that evidence to show that Dunn's June grand jury testimony was in fact true would be irrelevant in a §1623(c) prosecution. (Vol. II at 87, 113-114, 127-128, 153, 168). Of course, if the government had not chosen to proceed upon the inconsistent declarations theory, the government would have had to state which statements it intended to prove false, and Dunn's defense would have been to demonstrate that in fact such specified testimony was true. In addition, the jury was properly instructed that under 1623(c) the jury need not find which of the statements, that is, Dunn's June grand jury testimony or Dunn's Canges statement, was false, but rather that the jury need only find that the statements were so inconsistent that one had to be false. (Vol.II at 179).

CANGES' STATEMENT

Dunn's first argument is that the proceedings in Canges' office did not constitute a proceeding ancillary to a grand jury or court proceeding so as to come within the meaning of §1623(a) and (c).

The term "ancillary proceeding" has seldom been construed. Nor has the question of what other statement may be used to show inconsistency with grand jury testimony. "Ancillary proceeding" is generally defined as "one subordinate to or in aid of another primary action". Black's Law Dictionary (4th Ed.1968) at 112.

In the absence of a clear meaning for the term "ancillary proceeding", Dunn argues that his statement made in Canges' office was not taken in a proceeding before or ancillary to the grand jury. He argues that Gerald Cohen was not an officer for the United States District Court for the District of Colorado such that a statement taken by him could be ancillary to the federal court proceedings in United States v. Musgrave, and stresses that he was not advised of his rights nor was counsel present. Dunn analogizes to 18 U.S.C. §3503, which provides the method for taking depositions of unavailable witnesses, and implies that procedures more closely adherent to those outlined in §3503 may be found to be ancillary to a grand jury proceeding.

On the other hand, the government submits that Dunn's affidavit in Canges' office was taken in a proceeding ancillary to the grand jury proceeding, where the testimony was given under oath, administered by a notary public authorized to do so, where the testimony was taken in the office of an attorney of a defendant in a federal court proceeding, and where the affidavit was filed in that court proceeding and influenced the outcome of that proceeding.

This court has concluded that while the Canges statement is "ancillary", in the sense that it is connected to and had an effect upon the grand jury proceeding, the event occurring in Canges' office, in and of itself, is not a "proceeding" within the meaning of the statute so as to be a proceeding ancillary to a grand jury proceeding. Despite the administration of the oath and presence of the notary public, we hold that the event lacks the degree of formality the statute requires.

The court further concludes that Dunn's subsequent affirmation of his Canges statement, in the course of the hearing conducted in

the district court on Musgrave's motion to dismiss the indictment, clearly constitutes a proceeding ancillary to the grand jury proceeding. Thus, the admission into evidence of Dunn's testimony during the hearing on Musgrave's motion was proper in that it constituted an affirmation and adoption of the Canges statement, supportive thereof and cumulative in nature.

Furthermore, the admission into evidence of Dunn's testimony given at the Musgrave hearing does not create a fatal variance between proof at trial and the indictment. This court has consistently held that a variance between the indictment and evidence is not fatal unless the defendant could not have anticipated from the indictment what evidence would be presented at trial or unless the conviction based on an indictment would not bar a subsequent prosecution. United States v. Cowley, 452 F.2d 243 (10th Cir.1971); United States v. Freeman, 514 F.2d 1184 (10th Cir.1975). Clearly, where Dunn's testimony in the Musgrave motion hearing was inextricably related to his Canges statement, that is, affirming the truth of the latter, it cannot be said that Dunn could not have anticipated that such evidence would be presented against him at his perjury trial.

Finally, the court has also considered whether the indictment brought against Dunn meets the standards for sufficiency of an indictment as set forth in United States v. Radetsky, 535 F.2d 556 (10th Cir.1976). The government has repeatedly stated its reliance upon §1623(c) in this case. Therefore, to state an offense under that statute, the government had to allege inconsistent statements by Dunn made in one or more proceedings ancillary to a grand jury or court. In the indictment the government pleaded Dunn's grand jury testimony and Dunn's Canges statement, the latter of which we have determined is in and of itself not taken in a proceeding ancillary to the grand jury. While Dunn's testimony at the Musgrave hearing is clearly taken in a proceeding ancillary to the grand jury the government completely failed to plead such testimony in the indictment.

However, the sufficiency of an indictment is to be determined by practical rather than technical considerations, United States v. Crim, 527 F.2d 289 (10th Cir.1976), cert. denied 425 U.S. 905. Viewed in this practical light, where excerpts from the Canges statement were necessarily included in the indictment to establish "inconsistency", and where the Canges statement was inextricably related to Dunn's testimony in the Musgrave hearing which was taken in an ancillary proceeding, we hold that the indictment sufficiently states an offense under §1623(c).

GRAND JURY TESTIMONY:

Having established by response to the bill of particulars that the government intended to prove a violation of §1623(a) through the use of the method prescribed in §1623(c), Dunn contends that immunized grand jury testimony may not be used to establish the corpus delecti of a prosecution for inconsistent declarations without a prior showing of its falsity.

Prior to his testimony before the grand jury, Dunn was granted immunity in accord with 18 U.S.C. §6002 which provides:

> No testimony or other information compelled under the order may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

It is hornbook law that testimony given by a witness under a grant of immunity cannot be used to incriminate him in crimes or activities concerning which he gives testimony. Kastigar v. United States, 406 U.S. 441 (1972). However, the grant of immunity is never a license to commit perjury. In United States v. Tramunti, 500 F.2d 1334, 1344 (2nd Cir. 1974), cert. denied 419 U.S. 1079, the court stated:

> "The immunity granted by the court does not confer upon the witness the right to perjure himself or withhold testimony. . . . The very purpose of the granting of immunity is to reach the truth and when that testimony is

> incriminating, it cannot be used against him. If the witness thwarts the inquiry by evasion or falsehood, as the appellant did here, such conduct is not entitled to immunity. In fact, another crime not existing when the immunity was offered is thereby committed. The immunity does not extend in futuro."

Neither the Fifth Amendment nor statutory immunity offers a witness protection against prosecution for perjury, United States v. Frumento, 552 F.2d 534 (3rd Cir. 1977). In United States v. Mandujano, 425 U.S. 564, 576 (1976), Chief Justice Burger, speaking for the court, described the sanctions available to the government when an immunized witness commits perjury:

> "On the other hand, when granted immunity, a witness once again owes the obligation imposed upon all citizens - - the duty to give testimony - - since immunity substitutes for the privilege.
>
> "In this constitutional process of securing a witness' testimony, perjury simply has no place whatever. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative. The power of subpoena, broad as it is, and the power of contempt for refusing to answer, drastic as that is - - and even the solemnity of the oath - - cannot insure truthful answers. Hence, Congress has made the giving of false answers a criminal act punishable by several penalities; in no other way can criminal conduct be flushed into the open where the law can deal with it."

§1623 is a species of perjury. Its enactment was intended to facilitate perjury prosecutions and establish a new false declaration provision applicable to federal grand jury and court proceedings. United States v. Gross, 511 F.2d 910 (3rd Cir. 1975), cert. denied 423 U.S. 924; Organized Crime Control Act, Title IV, 1970 U.S. Code Cong. and Ad. News at 4007, 8.

We feel that Congress intended to include §1623 false declarations prosecutions within the perjury exceptions to the immunity grant of §6002. But see United States v. Berardelli, 565 F.2d 24, 29 (2nd Cir. 1977). Such interpretation is in the spirit of the perjury statutes, to insure against wrongs to the court and

to meet the ends of justice. Bronston v. United States, 409 U.S. 352 (1973). We observe that it would be an affront to the basic purpose of the criminal justice system to permit one to avoid likely prosecution under the grant of immunity. The import of statements made in the context of a grand jury proceeding were recognized by the Supreme Court in United States v. Harris, 311 U.S. 292 (1940):

> Section 125 of the Criminal Code makes no distinction between the false assertions of the fact of prior statements and the false assertions of any other fact. Nor can we see any reason to make one. As the Government points out, the denial of the fact that certain statements have been made may be equally as clear, deliberate, and material a falsehood as the denial of any other fact. And since statements made to government agents are generally one of the bases upon which criminal proceedings are instituted and indictments returned, such a distinction might substantially impede effective administration of criminal law. (Emphasis supplied.)
>
> 311 U.S., at p. 295.

We have carefully studied the cases relied upon by Dunn, including United States v. Patrick, 542 F.2d 381 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977); United States v. Housand, 550 F.2d 818 (2nd Cir. 1977), cert. denied, 431 U.S. 970 (1977); and United States v. Berardelli, supra. These cases involve the interrelationship between §6002 immunity, the Fifth Amendment, and §1623(c) inconsistent declarations prosecutions. Arising in different factual contexts, these decisions basically stand for the general proposition that immunized testimony may not be used to establish the corpus delecti of an inconsistent declarations prosecution without a prior showing of falsity.

However, unlike the fact situations of the above decisions relied upon by Dunn, Dunn's subsequent testimony in his Canges affidavit and in the Musgrave motion hearing not only were inconsistent with his immunized grand jury testimony, but, significantly, contained Dunn's admission that he had in fact testified falsely before the grand jury. Even though we have held that the government need not prove which of Dunn's statements were false for purposes of sustaining his conviction under §1623(a), (c), and while we do not decide whether, under other circumstances, immunized testimony may be admitted to demonstrate inconsistency without a prior showing of falsity, in our view Dunn's unequivocal admission that his immunized testimony before the grand jury was false justified the use of such immunized testimony to establish the corpus delecti of the present prosecution.

Immunity statutes are, of course, ordinarily for the benefit of the government, designed to effectively serve the compelling needs of the criminal justice system by preventing a substantial avoidance of prosecution and penalty. Dunn has grossly abused those purposes. In Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963), the Supreme Court said, inter alia:

> . . . Plainly the offer of immunity contained in the voluntary disclosure policy presupposed, at the very least, that a delinquent taxpayer would make a "clean breast of things" . . . . [in] deciding whether to disclose or run the risk of prosecution petitioners were initially justified in relying on the Treasury's general offer of immunity . . . once a fraudulent disclosure had been determined upon they must be deemed to have recognized that such an offer had in effect been withdrawn as to them or, amounting to the same thing, that they were no longer entitled to place reliance on it.

> Petitioners are thus in legal effect left in no better position than they would have been had the treasury formally withdrawn its offer of immunity before their disclosure figures were furnished. (Underlining supplied.)
>
> 371 U.S., at pp. 349, 350.

In the instant case, Dunn's recantation was, in an analogy to Shotwell, supra, an admission that he had not made a "clean breast of things" in his immunized testimony before the grand jury which implicated Musgrave. Thus, such false testimony stripped him of the cloak of immunity which he was initially entitled to rely upon. Dunn's recantation thus -- as in Shotwell -- in legal effect left him in no better position than he would have been in had the Government formally withdrawn its offer of immunity before he testified before the grand jury.

WE AFFIRM.

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IN THE SUPREME COURT OF THE UNITED STATES

ROBERT DUNN,
Defendant-Appellant,
vs.
UNITED STATES OF AMERICA,
Plaintiff-Appellee.

NO. 77-6949

SUPPLEMENTAL BRIEF

COMES NOW the appellant, Robert Dunn, pursuant to Rule 24 of the Supreme Court Rules and for his supplemental memorandum of authorities hereby states:

1. Appellant, in his Petition for Writ of Certiorari, questioned whether a statement by a witness that he had falsified approximately 90 percent of his grand jury testimony could be used against him in an inconsistent declarations prosecution under Title 18, United States Code, Section 1623(c). A further argument raised on appeal before the U. S. Tenth Circuit Court of Appeals questioned whether the trial judge erred in allowing the jury to consider declarations that were not incorporated in the indictment, to wit: the October 21, 1976, statement by appellant that he had lied to the grand jury in approximately 90 percent of his declarations. The U. S. Tenth Circuit Court of Appeals handled the variance issue as follows:

> "Furthermore, the admission into evidence of Dunn's testimony given at the Musgrave hearing does not create a fatal variance between proof at trial and the indictment. This court has consistently held that a variance between the indictment and evidence is not fatal unless the defendant could not have anticipated from the indictment what evidence would be presented at trial and unless the conviction based on an indictment would not bar a subsequent prosecution. (Citations omitted.) Clearly, where Dunn's testimony in the Musgrave motion hearing was inextricably related to his Canges statement, that is, affirming the truth of the latter, it cannot be said that Dunn could not have anticipated that such evidence would be presented against him at his perjury trial."
> (See Opinion attached to Petition for Writ of Certiorari, p. 7).

At trial, Dunn objected to the use of the testimony in the October 21, 1976, hearing before Judge Winner on the basis that the statements were not incorporated into the Indictment and therefore, could not be considered in an inconsistent declarations prosecution. Defense counsel contended that this extended the bounds of the Indictment beyond those specific statements alleged to have been inconsistent. Though not articulated very well in the Petition for Writ of Certiorari, counsel contends that the trial court and the U. S. Tenth Circuit Court of Appeals erred in overruling counsel's objections to the broadening the scope of the Indictment. Counsel for appellant contends that the trial court amended the Indictment in violation of Stirone v. United States, 361 U.S. 212 (1960). See also Russell v. United States, 369 U.S. 749 (1962).

Based on the circumstances above argued and tendered to the Court in the Petition for Writ of Certiorari, this Honorable Court is respectfully requested to review the conviction of the appellant below.

Respectfully submitted,

DANIEL J. SEARS
Federal Public Defender

CERTIFICATE OF SERVICE

I certify that copies of the above SUPPLEMENTAL BRIEF have been placed in the United States Mails on the 4th day of August, 1978, addressed as follows:

Wade H. McCree, Jr.
Office of the Solicitor General
U. S. Department of Justice
Washington, D. C. 20530

Thea Cooper

Thea Cooper

Supreme Court, U. S.
FILED
JAN 5 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 77-6949

ROBERT DUNN,
Petitioner,

—vs.—

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 20, 1978
CERTIORARI GRANTED DECEMBER 11, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-6949

ROBERT DUNN,

Petitioner,

—*vs.*—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

1976

12-15 INDICTMENT ($5,000-10%)
Warrant of Arrest issued.

1977

2-11 ARRAIGNMENT (SGF) Deft. enters plea of NOT GUILTY to Cts. 1, 2, 3 . . . Case be set for trial 4-11-77 . . . Deft. has 15 days to file motions . . . Bond cont'd. eod 2-14-77.

2-23 Trial set for wk of 4-11-77.

3-10 MOTION of Deft. for Bill of Particulars.

**3-16 Minute Order (SGF) Deft's Motion for Bill of Particulars is set for hearing 3-25-77 at 10 a.m. . . . Govt. to file answer on or before 3-25-77. c.o.m.

3-18 Govt's Response to Motion for Bill of Particulars.

3-22 Memo in Support of Motion for Bill of Particulars.

3-25 HEARING (SGF) Oral argument waived . . . Ordered: Motion for Bill of Particulars is denied . . . Bond cont'd . . . Recess. eod 3-28-77.

4-13 Trial Brief of Deft.
MOTION of Deft. for Judgment of Acquittal.

**4-11 TRIAL TO JURY (SGF) 1st Day . . . Jurors selected —excused to 4-13-77

4-13 TRIAL TO JURY (SGF) 2nd day . . . Jurors sworn to try . . . Witnesses . . . Exhibits . . . Closing arguments . . . Court instructs jury . . . Jury commences deliberations . . . Court in recess to 4-14-77. eod 4-19-77

RELEVANT DOCKET ENTRIES—CONTINUED

1977

4-14 TRIAL TO JURY (SGF) 3rd Day . . . Jury continues deliberations . . . Jury returns verdict of NOT GUILTY to Ct. 1, GUILTY to Ct. 2, GUILTY to Ct. 3, GUILTY to Ct. 4, NOT GUILTY to Ct. 5 . . . Motions to be filed by 4-25-77; reply due by 5-2-77 . . . Bond cont. eod 4-19-77

5-6 HEARING (SGF) Ordered: Hearing on Deft's Motion for Acquittal filed during trial set for special hearing on 5-23-77 at 9 a.m. eod 5-6-77.

5-13 Signed (SGF) Order re: Govt. has until 5 p.m. 5-16-77 to file answer & memo of authorities to Deft's Motion for Acquittal & pre-trial brief . . . Deft. has until 5 p.m. 5-19-77 to file any response. eod 5-17-77 c.o.m.

5-23 HEARING (SGF) Re: Motion for Judgment of Acquittal . . . Matter submitted on briefs . . . Ordered: Motion is denied . . . Oral findings of fact & conclusions of law given from bench . . . Recess. eod 5-24-77

5-23 SENTENCING (SGF) Deft. be impr. 5 yrs. as to Cts. 2, 3, 4; Cts. 3 & 4 to run conc. w/Ct. 2 . . . Deft. advised of right to appeal . . . Bond cont'd pending appeal . . . Transcript for appeal to be pd. for by govt . . . Deft. to report to Prob. Office on the 1st & 15th of every mo. while on bond pending appeal, advising them of current address & place of employment . . . eod 5-24-77

Signed (SGF) Judgment and Commitment. eod 5-24-77

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 76-CR-322

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROBERT DUNN, DEFENDANT

INDICTMENT—Filed Dec. 15, 1976

18 USC § 1623

COUNT I

The Grand Jury charges that:

1. On June 16, 1976, at Denver in the District of Colorado, ROBERT DUNN, while under oath as a witness in a proceeding before a Grand Jury of the United States in the District of Colorado, did knowingly make a false material declaration, as more fully set forth in paragraphs 2 through 6 of this Count I, in violation of Title 18, United States Code, Section 1623.

2. At the time and place aforesaid, the Grand Jury was conducting an investigation to determine whether there were violations of the federal conspiracy and drug abuse prevention and control statutes.

3. It was a matter material to this investigation to determine whether ROBERT DUNN had ever assisted Phillip Musgrave in smuggling controlled substances into the Colorado State Penitentiary through Steve and Debbie Strammel.

4. At the time and place aforesaid, ROBERT DUNN, while under oath, did knowingly declare before the Grand Jury with respect to the aforesaid material matter as follows:

Q. Did you assist him (Phillip Musgrave) in getting stuff smuggled into the penitentiary?

A. Yes, sir, once.

Q. Was that with the Strammels?
A. Yes, sir.

5. At a time subsequent to ROBERT DUNN's declaration as aforesaid, that is, on September 30, 1976, while under oath as a witness in a proceeding ancillary to *United States* v. *Musgrave, et al.*, Criminal Case No. 76-CR-155, ROBERT DUNN did knowingly declare with respect to the aforesaid material matter as follows:

Q. What about Steve Stramel. Did you ever know Steve Stramel?
A. Uh not knowing, by being introduced to him. I seen him at one time.
Q. Where did you see him?
A. Uh him and a girl Debra, Debbie uh came up to see Phillip and I seen him across the visiting room. I was visiting with some friends of mine that came up from Denver and I just seen him from a distance. I . . . I couldn't even . . . I doubt if I could recognize him.
Q. You never had any conversation with either Steve . . .
A. No sir.
Q. . . . or his girlfriend or wife, Debbie?
A. No.
Q. Did you ever smuggle in drugs to the institution from Steve and Debbie?
A. No sir.

6. The aforesaid declarations by ROBERT DUNN, as set forth in paragraphs four (4) and five (5) of this Count I were inconsistent to the degree that one of said declarations was false and known by him to be false when made.

COUNT II

The Grand Jury further charges that:

1. On June 16, 1976, at Denver in the District of Colorado, ROBERT DUNN, while under oath as a witness in a proceeding before a Grand Jury of the United States in the District of Colorado, did knowingly make

a false material declaration, as more fully set forth in paragraphs 2 through 6 of this Count II, in violation of Title 18, United States Code, Section 1623.

2. At the time and place aforesaid, the Grand Jury was conducting an investigation to determine whether there were violations of the federal conspiracy and drug abuse prevention and control statutes.

3. It was a matter material to this investigation to determine whether Phillip Musgrave ever gave ROBERT DUNN a controlled substance while both were incarcerated in the Colorado State Penitentiary.

4. At the time and place aforesaid, ROBERT DUNN, while under oath, did knowingly declare before the Grand Jury with respect to the aforesaid material matter as follows:

Q. Did he (Phillip Musgrave) have drugs there in the penitentiary?
A. All the time.
Q. Did you work with him or for him in the penitentiary?
A. I was a gopher boy; I went for pop, commensary and held his stash for him.
Q. What did you get in return?
A. A fair amount of speed every time he'd cop.
Q. Every time he had some, he'd give you some?
A. Oh, yes, sir. I don't know whether it was because he liked me, because he wanted to do it, or because he was paranoid if he didn't do it, something bad would happen at first.

5. At a time subsequent to ROBERT DUNN's declaration as aforesaid, that is, on September 30, 1976, while under oath as a witness in a proceeding ancillary to *United States* v. *Musgrave, et al.*, Criminal Case No. 76-CR-155, ROBERT DUNN did knowingly declare with respect to the aforesaid material matter as follows:

Q. During the time that you were in the penitentiary uh did Phillip Musgrave ever give you any drugs of any sort?
A. No sir, he didn't.

6. The aforesaid declarations by ROBERT DUNN, as set forth in paragraphs four (4) and five (5) of this Count II were inconsistent to the degree that one of said declarations was false and known by him to be false when made.

COUNT III

The Grand Jury further charges that:

1. On June 16, 1976, at Denver in the District of Colorado, ROBERT DUNN, while under oath as a witness in a proceeding before a Grand Jury of the United States in the District of Colorado, did knowingly make a false material declaration, as more fully set forth in paragraphs 2 through 6 of this Count III in violation of Title 18, United States Code, Section 1623.

2. At the time and place aforesaid, the Grand Jury was conducting an investigation to determine whether there were violations of the federal conspiracy and drug abuse prevention and control statutes.

3. It was a matter material to this investigation to determine whether ROBERT DUNN made telephone calls to Kate Blehm regarding drugs from the Colorado State Penitentiary.

4. At the time and place aforesaid, ROBERT DUNN, while under oath, did knowingly declare before the Grand Jury with respect to the aforesaid material matter as follows:

Q. Did you make some calls for Musgrave to Kate?
A. Yes, sir, I did.
Q. Did he give you the phone number?
A. Yes, sir, both of them.
Q. He gave you two phone numbers?
A. One where she worked at the—881-2273, at the Rustic Resort and at home, 881-2278, and that's in Belleview. I may have them numbers mixed up, but I'm not sure. It's been quite a while since I called the number.
Q. So you would call and give messages to Kate also in addition to Musgrave?
A. Yes.

Q. Did you have any code names you were supposed to use?
A. He was one, Jimmy Heath was two and I was three.
Q. Did you talk about speed or did you use another word?
A. Bull shit, excuse me.
Q. That was the code name for the speed?
A. Yes, sir.

5. At a time subsequent to ROBERT DUNN's declaration as aforesaid, that is, on September 30, 1976 while under oath as a witness in a proceeding ancillary to *United States* v. *Musgrave, et al.*, Criminal Case No. 76-CR-155, ROBERT DUNN did knowingly declare with respect to the aforesaid material matter as follows:

Q. Now who is Kate?
A. Kate Blehm.
Q. And who was she?
A. Phil's uh girl.
Q. Alright.
A. Uh he asked me if I would call her and ask . . . and have her bring up a book, you know, like a tarot card book that uh shows you how to read 'em and how to uh understand 'em. And uh to be sure and come up and see him. Uh that was it.
Q. Was there any mention or any code with reference to drugs in any conversation with Kate Blehm?
A. No sir.
Q. Did Phillip tell you what to say to her insofar as code which might involve speed or the smuggling of drugs into the institution?
A. No sir. All he said was see . . . tell her to get me uh a tarot card book and to be sure and come up to see him.

6. The aforesaid declarations by ROBERT DUNN, as set forth in paragraphs four (4) and five (5) of this Count III were inconsistent to the degree that one of said declarations was false and known by him to be false when made.

COUNT IV

The Grand Jury further charges that:

1. On June 16, 1976, at Denver in the District of Colorado, ROBERT DUNN, while under oath as a witness in a proceeding before a Grand Jury of the United States in the District of Colorado, did knowingly make a false material declaration, as more fully set forth in paragraphs 2 through 6 of this Count IV, in violation of Title 18, United States Code, Section 1623.

2. At the time and place aforesaid, the Grand Jury was conducting an investigation to determine whether there were violations of the federal conspiracy and drug abuse prevention and control statutes.

3. It was a matter material to this investigation to determine whether Phillip Musgrave ever gave ROBERT DUNN a list of chemicals useful in the manufacture of methamphetamine.

4. At the time and place aforesaid, ROBERT DUNN, while under oath, did knowingly declare before the Grand Jury with respect to the aforesaid material matter as follows:

> Q. During February of '76, did you see Musgrave again and find out—did he say that he still wanted any of those chemicals?
>
> A. Yes. I was living out on West 58th Avenue in Arvada, 14500 West 58th. It was a 10-acre farm that me and a friend of mine was renting—me and a friend of mine and his wife, and it was pretty excluded, had a barn. And the guy that I was living with, he worked out at Continental Oil also and he came into town looking for me on a Monday and I had just had some teeth pulled and I didn't feel like messing with anybody so I just started spacing him out—just not meeting when I was supposed to, and he chased me for three and a half days until he finally caught up with me.
>
> Q. What did he want when he caught up with you?

> A. Propenyl, methylamine. He wrote out on an envelope—a big manilla envelope that I still have—all the chemicals that are needed.
>
> Q. Musgrave wrote this out on the envelope?
>
> A. Yes, sir.

5. At a time subsequent to ROBERT DUNN's declaration as aforesaid, that is, on September 30, 1976 while under oath as a witness in a proceeding ancillary to *United States* v. *Musgrave, et al.*, Criminal Case No. 76-CR-155, ROBERT DUNN did knowingly declare with respect to the aforesaid material matter as follows:

> Q. Did you ever at any time ever get a list of chemicals from Mr. Musgrave for any purpose?
>
> A. No sir.

6. The aforesaid declarations by ROBERT DUNN, as set forth in paragraphs four (4) and five (5) of this Count IV were inconsistent to the degree that one of said declarations was false and known by him to be false when made.

COUNT V

The Grand Jury further charges that:

1. On June 16, 1976, at Denver in the District of Colorado, ROBERT DUNN, while under oath as a witness in a proceeding before a Grand Jury of the United States in the District of Colorado, did knowingly make a false material declaration, as more fully set forth in paragraphs 2 through 6 of this Count V in violation of Title 18, United States Code, Section 1623.

2. At the time and place aforesaid, the Grand Jury was conducting an investigation to determine whether there were violations of the federal conspiracy and drug abuse prevention and control statutes.

3. It was a matter material to this investigation to determine whether Edward Perkins had ever delivered methamphetamine to ROBERT DUNN.

4. At the time and place aforesaid, ROBERT DUNN, while under oath, did knowingly declare before the Grand Jury with respect to the aforesaid material matter as follows:

Q. Did you have a meeting with Perkins some time?

A. He came down one night. Cebe sent me down a half ounce as a bonus for the girl I got him, that Kris.

Q. Was this in November or December of '75?

A. Yeah.

Q. Okay.

A. And Eddie Perkins come down and delivered it.

Q. Delivered it to you?

A. No, he come in kind of funny. He come in the front door of the apartment, said it was on the outside window sill of the bedroom and it was one of these—it was a basement where you couldn't roll the windows and they were roll-type windows and you couldn't roll them all the way out and I couldn't get my arm out there and Charlotte, my girl at the time, couldn't get her arm out there, so he stuck his arm out there and got it.

Q. And gave it to you?

A. Yes, sir, and then he did about six 180 degree turns and out the door.

5. At a time subsequent to ROBERT DUNN's declaration as aforesaid, that is, on September 30, 1976, while under oath as a witness in a proceeding ancillary to *United States* v. *Musgrave, et al.*, Criminal Case No. 76-CR-155, ROBERT DUNN did knowingly declare with respect to the aforesaid material matter as follows:

Q. You've met Eddie Perkins once or twice?

A. Uh twice.

Q. And how long did each of those meetings or uh social events take place?

A. With Mr. Perkins the first time, it was about three minutes. In other words, he came in and delivered a message you know, Phillip was in town and if I wanted to see and meet him for dinner. And the second time was at uh Aurora, a friend of mine's house. Went out to uh . . . I went out to sell a guy some tires and Eddie was there. Uh

somethin' happened to his car. Oh, his wife or his ex-wife took his car and he didn't have any transportation. And he was waitin' for a ride and I . . . that was no more than hello and goodbye.

Q. Did you ever have any business dealings of any sort with Mr. Perkins?

A. No sir.

Q. Did you ever buy any speed from him?

A. No, but I'd sure like to sell him some.

Q. Did you sell him any?

A. No.

Q. Alright. Did you ever discuss speed with Mr. Perkins?

A. No sir.

6. The aforesaid declarations by ROBERT DUNN, as set forth in paragraphs four (4) and five (5) of this Count V were inconsistent to the degree that one of said declarations was false and known by him to be false when made.

A TRUE BILL:

/s/ [Illegible]
Foreman

JAMES L. TREECE
United States Attorney

BY: /s/ Edward W. Nottingham
EDWARD W. NOTTINGHAM
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 76-CR-322

[Title Omitted in Printing]

MOTION FOR BILL OF PARTICULARS—
Filed March 10, 1977

COMES NOW the defendant, by and through his counsel, Federal Public Defender, Daniel J. Sears, and respectfully moves this Court for a Bill of Particulars as to the following matters:

1. In paragraphs 4 and 5 of each respective count, the indictment in the above case alleges that the defendant made certain declarations before the Grand Jury and on September 30, 1976, in a proceeding ancillary to *United States* v. *Musgrave, et al.*, Criminal Case No. 76-CR-155, respectively. In paragraph 6 of each respective count, the indictment alleges that the "aforesaid declarations . . . as set forth in paragraphs four (4) and five (5) . . . were inconsistent to the degree that one of said declarations was false and known by him to be false when made.

The defendant requests that the government file a Bill of Particulars setting out which of the declarations in paragraphs 4 and 5 of each count are inconsistent with each other, or, in the alternative, which of the statements alleged was false and known by the defendant to be false when made.

As grounds therefore, the defendant states:

1. That each count charges a violation of Title 18, United States Code, Section 1623 without alleging the subsection under which he is charged. The indictment alleges the language of an inconsistent declarations violation in the language of subsection (c) yet alleges that one of said declarations was false without specifying which it intends to prove is false.

2. The defendant requires such information to adequately prepare a defense.

WHEREFORE, the defendant requests that a Bill of Particulars be filed by the government specifying which declarations it deems inconsistent in each count, or in the alternative, which declarations it charges were false and known to the defendant to be false when made.

Respectfully submitted,

/s/ Daniel J. Sears
DANIEL J. SEARS
Federal Public Defender

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 76-CR-322

[Title Omitted in Printing]

MEMORANDUM IN SUPPORT OF
MOTION FOR BILL OF PARTICULARS—
Filed March 22, 1977

It is well held that a Motion for Bill of Particulars is addressed to the sound discretion of the trial court. *United States* v. *Hedges*, 458 F.2d 188, 191 (10th Cir. 1972). And a decision by the trial court will not be disturbed absent an abuse of discretion such that an accused was denied information which would have more specifically defined the offense charged. *United States* v. *Gleeson*, 411 F.2d 1091 (10th Cir. 1969).

The indictment, on its face, must be sufficient to allow a defendant to adequately prepare a defense. If it is not, then a bill of particulars should fulfill that function. *Tritt* v. *United States*, 421 F.2d 928, 950 (10th Cir. 1970).

It is no answer to a denial of a bill of particulars to say that a defendant knew what he did. *King* v. *United States*, 402 F.2d 289, 292 (10th Cir. 1968).

The defendant in the present case submits that in order to effectively prepare for trial, he must know the specific allegations of inconsistent declarations he must meet, or, in the alternative, which declarations the government contends are false. What must be met as a matter of proof to defend against charges that declarations made on two separate occasions are inconsistent with each other is substantially different than preparing to prove the truth of alleged false declarations. And where the declarations alleged to be inconsistent or false are several within a single count of an indictment, the defendant must be apprised of which particular statements are alleged to be inconsistent with each other, or, in the alternative, which were allegedly false when made.

If, in an obstruction case, the defendant is entitled to know the identities of jurors or acquaintances through whom influence or intimidation was alleged to have been transmitted, certainly statements alleged to be inconsistent, or, in the alternative, false in a perjury case should be set out to the defendant. *Cefalu* v. *United States*, 234 F.2d 522, 525 (10th Cir. 1956).

The government in its Response to Motion for Bill of Particulars misconstrues the defendant's request. The defendant agrees that only one offense is defined under 18 U.S.C. § 1623 with alternative ways of violating the statute. The defendant submits, however, that he is entitled to know under which theory the government expects to proceed. The language of the indictment closely follows the phraseology of 18 U.S.C. § 1623(c) but subsection "c" is not cited. The defendant will be greatly prejudiced if it prepared a defense of an inconsistent declaration theory and discovers, at trial, that the government expects to prove that some of the statements were false when made. A bill of particulars serves to prevent such surprise to a defendant. *Williams* v. *United States*, 289 F.2d 598, 601 (9th Cir. 1961). Defendant requests that the government particularize which section of the statute is being proceeded under, and if it is subsection c, then which particular declarations are alleged to be inconsistent with each other.

To answer that any ambiguity, as the government states in its Response, is "resolved by a reading of the grand jury transcript against the transcript of Mr. Dunn's subsequent statement under oath . . ." points out the very problem. The defendant is entitled to know *which* statements in the grand jury transcript are to be read against *which* statements in the subsequent sworn statement.

Paragraph one of each count alleges that the defendant "while under oath as a witness before a Grand Jury of the United States in the District of Colorado, did *knowingly make* a *false* material *declaration*, *as more fully set forth* in paragraphs 2 through 6 of this Count ——, in violation of Title 18, United States Code, Section 1623." (See Indictment; Emphasis added.) In

paragraphs 4 and 5 of each count, certain declarations are alleged to have been made without specifying which were allegedly false. Paragraph one alleged that false declarations were made and promised to "more fully set forth" those false declarations but did not identify those which are alleged to be false as promised.

In paragraph 6 of each count, the indictment alleges that "[t]he aforesaid declarations by Robert Dunn, as set forth in paragraphs four (4) and five (5) of this Count—were inconsistent to the degree that one of said declarations was false and known by him to be false when made." (See Indictment.)

Thus, the government has charged in paragraph one in each count that false declarations were made before the federal grand jury but has not specified which were false. Under such an allegation, the government must prove beyond a reasonable doubt that such an allegation was knowingly false when made.

Title 18, U.S.C. § 1623(c) provides, however, that where the defendant "has knowingly made two or more declarations, which are *inconsistent to the degree that one of them is necessarily false* . . ." the government "*need not specify which declaration is false* . . ." if certain conditions are met. Title 18, United States Code, Section 1623(c) (as amended, 1970). The inconsistent declarations language is alleged in paragraph six of each count.

Therefore, paragraph one of each count charges a false declaration under 18 U.S.C. § 1623(a) without specifying which is false, and paragraph 6 charges inconsistent declarations under 18 U.S.C. § 1623(c) and need *not* specify which is false. Defendant submits the government cannot have the best of both worlds. The defendant is entitled to know under which subsection the government is proceeding and what it is expected to defend against at trial.

Respectfully submitted,

/s/ Daniel J. Sears
DANIEL J. SEARS
Federal Public Defender

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 76-CR-322

[Title Omitted in Printing]

GOVERNMENT'S RESPONSE TO
MOTION FOR BILL OF PARTICULARS—
Filed March 18, 1977

THE MOTION FOR BILL OF PARTICULARS SHOULD BE DENIED, BECAUSE THE GOVERNMENT IS NOT REQUIRED TO STATE OR PROVE, IN A PROSECTUTION UNDER 18 U.S.C. § 1623, WHICH OF TWO INCONSISTENT DECLARATIONS IS FALSE.

Defendant has requested the Government to specify, in a Bill of Particulars, which of defendant's statements set forth in the Indictment was false or, in the alternative, which of the allegedly inconsistent declarations in each count of the Indictment are inconsistent with each other. The argument appears to rest on the premises (1) that two separate types of offenses can be alleged under 18 U.S.C. § 1623, one under subsection (a) and the other under subsection (c), and (2) that the Government is required to state and prove which of two allegedly inconsistent declarations is false. We disagree with both premises and thus resist the Motion for a Bill of Particulars.

Title 18 U.S.C. § 1623(a) says it is a crime to make "any false material declaration . . . in any proceeding before or ancillary to any court or grand jury of the United States . . . ." Title 18 U.S.C. § 1623(c) merely defines what an indictment, charging false declarations before a grand jury, must allege and articulates one way of proving a false declaration before a grand jury. It does not delineate a separate offense. All of this is stated in the legislative history of the section:

> *This subsection* [subsection c], *as amended by the committee, therefore, provides specifically for the prosecution of a false declaration in the case of irreconcilable contradictory statements without the necessity of specifying which of the declarations is false. It requires that each declaration upon which the prosecution is based was material to a point in question in the proceeding in which it was made, and was made within the period of the statute of limitations for the offense charged. . . . It should be noted that the subsection relates solely to the establishment of the element of falsity in the offense which is delineated in subsection (a).* H.R. Rep. No. 91-1549 (91st Cong., 2d Sess). [1970 U.S. Code Cong. & Admin. News 4007, 4023.] (Emphasis supplied)

As the legislative history demonstrates, we do not need to prove at trial which of the declarations is false. Therefore, we should not have to specify in a Bill of Particulars which is false. As for the alternate request that we specify which of the declarations is inconsistent with the other, the Government's position is that the declarations set forth in each count of the Indictment speak for themselves. To the extent that there is any ambiguity in definition of terms, such as the meaning of the word "stuff" in paragraph 4 of Count I, that ambiguity is resolved by a reading of the grand jury transcript against the transcript of Mr. Dunn's subsequent statement under oath. Defense counsel has both of those documents, and there would thus seem to be no need for a Bill of Particulars defining which of the statements is inconsistent.

Dated at Denver, Colorado, this 18th day of March, 1977.

Respectfully submitted,

JAMES L. TREECE
United States Attorney

By: /s/ Edward W. Nottingham
EDWARD W. NOTTINGHAM
Assistant United States Attorney
323 U.S. Courthouse
1929 Stout Street
Denver, CO 80294
837-2081
Attorneys for Plaintiff

DEFENDANT'S EXHIBIT F-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. ————

IN THE MATTER OF THE GRAND JURY

APPLICATION FOR ORDER TO GRANT IMMUNITY AND COMPEL TESTIMONY UNDER TITLE 18, UNITED STATES CODE, SECTIONS 6002-6003—Filed June 16, 1976

The United States Attorney for the District of Colorado makes application to the United States District Court for the District of Colorado for an Order granting immunity to and compelling the testimony of ROBERT DWIGHT DUNN pursuant to Title 18, United States Code, Sections 6002-6003. The reasons for this application are as follows:

1. The Federal Grand Jury presently sitting at Denver, Colorado, was duly empanelled and sworn on February 11, 1975, and is presently investigating violations of the following criminal statutes of the United States:

Title 21, United States Code, § 841(a)(1)
Title 21, United States Code, § 846

2. The witness ROBERT DWIGHT DUNN on June 15, 1976, appeared in person pursuant to subpoena issued in connection with the above investigation before the Federal Grand Jury presently sitting in Denver, Colorado, and refused to testify, relying on his Fifth Amendment privilege against self-incrimination;

3. Mr. Richard L. Thornburgh, Assistant Attorney General of the United States by authority vested in him by Title 18, United States Code, Sections 6002-6003 and Title 28, Code of Federal Regulations, Section 0.175 has granted authority by letter to the United States Attorney for the District of Colorado to make application to the United States District Court for the District

of Colorado for an order or orders granting immunity and compelling the testimony of ROBERT DWIGHT DUNN pursuant to Title 18, United States Code, Sections 6002-6003;

4. The United States Attorney for the District of Colorado represents to the United States District Court for the District of Colorado that the testimony and other information from ROBERT DWIGHT DUNN is necessary to the public interest;

WHEREFORE, the United States Attorney for the District of Colorado, makes application to the United States District Court for the District of Colorado for an order to grant immunity to and compel the testimony of ROBERT DWIGHT DUNN pursuant to Title 18, United States Code, Sections 6002-6003.

/s/ James L. Treece
JAMES L. TREECE
United States Attorney for
the District of Colorado

ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

DEPARTMENT OF JUSTICE
Washington 20530

RLT:KWM:CAC:clb
84381

June 10, 1976

Honorable James L. Treece
United States Attorney
District of Colorado
Denver, Colorado 80202

Attn: Rod Snow
Assistant United States Attorney

Re: Grand Jury Investigation
Robert Dewight Dunn

Dear Mr. Treece:

Pursuant to the authority vested in me by 18 U.S.C. § 6003(b) and 28 C.F.R. § 0.175(a) I hereby approve your request for authority to apply to the United States District Court for the District of Colorado for an order pursuant to 18 U.S.C. § 6002-6003 requiring Robert Dewight Dunn to give testimony or provide other information in the above matter and in any further proceedings resulting therefrom or ancillary thereto.

Sincerely,

/s/ Richard L. Thornburgh
RICHARD L. THORNBURGH
Assistant Attorney General
Criminal Division

[SEAL]

DEFENDANT'S EXHIBIT F-2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. ———

IN THE MATTER OF THE GRAND JURY

ORDER GRANTING IMMUNITY AND COMPELLING TESTIMONY UNDER TITLE 18, UNITED STATES CODE, SECTIONS 6002-6003—Filed June 16, 1976

Upon the application of the United States Attorney for the District of Colorado for an Order Granting Immunity and Compelling Testimony under Title 18, United States Code, Sections 6002-6003, the United States District Court finds as follows:

1. The Federal Grand Jury presently sitting at Denver, Colorado, was duly empanelled and sworn on February 11, 1975, and is presently investigating violations of the following criminal statutes of the United States:

Title 21, United States Code, § 841(a)(1)
Title 21, United States Code, § 846

2. The witness ROBERT DWIGHT DUNN on June 15, 1976, appeared in person pursuant to subpoena issued in connection with the above investigation before the Federal Grand Jury presently sitting in Denver, Colorado, and refused to testify relying on his Fifth Amendment privilege against self-incrimination;

3. Mr. Richard L. Thornburgh, Assistant Attorney General of the United States, by authority vested in him by Title 18, United States Code, Sections 6002-6003, and Title 28, Code of Federal Regulations, Section 0.175, has granted authority to the United States Attorney for the District of Colorado to make application to the United States District Court for the District of Colorado for an order or orders granting immunity and compelling

the testimony of ROBERT DWIGHT DUNN pursuant to Title 18, United States Code, Sections 6002-6003;

4. The United States Attorney for the District of Colorado represented to the United States District Court for the District of Colorado that the testimony and other information from ROBERT DWIGHT DUNN is necessary to the public interest;

THEREFORE, it is hereby ordered as follows:

1. That the witness ROBERT DWIGHT DUNN give testimony and provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination and that the witness is not excused from testifying or providing other information on the ground that such testimony or information may incriminate him or subject him to penalty or forfeiture;

2. That no testimony or other information compelled under this order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness ROBERT DWIGHT DUNN in any criminal case, in any court, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this order.

Dated at Denver, Colorado, this 15th day of June, 1976.

BY THE COURT:

/s/ [Illegible]
United States District Judge

GOVERNMENT EXHIBIT 1-a

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
FEDERAL GRAND JURY

IN THE MATTER OF THE FEDERAL GRAND JURY

TESTIMONY OF ROBERT DWIGHT DUNN

Grand Jury Hearing Room
164 United States Courthouse
Denver, Colorado 80202
Wednesday, July 16, 1976

The above-entitled matter came on for hearing before the Federal Grand Jury at 9:25 o'clock a.m., this date.

APPEARANCES:

For the United States Government	RODNEY W. SNOW, ESQ. Assistant United States Attorney 323 United States Courthouse Denver, Colorado 80202

[p. 2]

PROCEEDINGS

ROBERT DWIGHT DUNN,

a witness herein, after having been first duly sworn by the Foreman to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. SNOW:

* * * *

[p. 3]

Q State your name, please?
A Robert Dwight Dunn.

* * * *

Q When did you first get involved in the drug scene?
A 1969.

* * * *

[p. 9]
Q All right. Do you recall having an occasion to go to Vicki Burr's house at 480 South Washington?
A Yes, sir, I do.

* * * *

[p. 10]
Q All right. Let's go back to what happened there at South Washington. Did you meet Phillip Musgrave there?
A Yes, sir, I did. I was selling bags, which was very—I don't do that very often.
Q Why, because it's a lot or what?
A No. I just—I recognize myself as in the security part of—or have been in the security part of the illicit speed traffic. I check for security. If they're security type, they don't get ripped; if it's not, I rip them and I've never had anybody come back on me. So I was out selling bags—I was doing more than I was selling, but I was putting up a front that I was selling and Sparky had asked me if I had any bags, that he had someone who wanted to buy one and Sparky—he run around with me for a while, so he more or less knew what I did and he did the same thing and I was afraid he was going to try and rip me, so I said, "No, I'll sell him the bag." And we went in the bedroom and there was a fairly good-sized dude, about six foot, two hundred pounds, leather hat, beard and doberman pinscher, and I knew who it was because I had

[p. 11]
heard stories about him.
Q Did you know him as Cebe?
A Everybody called him Steve.
Q Steve?
A Steve. I think it was a mistake in names. They used to call him Cebe; his middle name was Cebe, but somebody got Steve started and he just kept the name Steve. He just got out of jail and didn't have any dope

with him in town so I sold him a half gram and I took a half gram and we got high together and he paid me and he said the next time he was in town, he'd square me away, that he just didn't have anything with him.

* * * *

[p. 14]
Q When you got to Canon City, did you see Musgrave?
A First day.
Q Where did you see him?
A At Diagnostic Center in the fish tank. I was on the second tier on the east side and he was on the third tier on the west side and he was right directly across from me. And I had heard from a couple of people that he was hot on my case; I was supposed to be setting him up with the man and the only thing I was trying to set him up for was relieving him of what he had.

[p. 15]
Q Did you get high, then, in the penitentiary?
A You bet. Stayed high in the penitentiary.
Q Did he have drugs there in the penitentiary?
A All the time.
Q Did you work with him or for him in the penitentiary?
A I was a gopher boy; I went for pop, commensary and held his stash for him.
Q What did you get in return?
A A fair amount of speed every time he'd cop.
Q Every time he had some, he'd give you some?
A Oh, yes, sir. I don't know whether it was because he liked me, because he wanted to do it, or because he was

[p. 16]
paranoid if he didn't do it, something bad would happen at first.
Q Did you assist him in getting stuff smuggled into the penitentiary?
A Yes, sir, once.
Q Was that with the Strammels?
A Yes, sir.

Q Would you tell us about that, please?
A How shall I get around that one part?
Q Well, jut tell them about that one part.
A Okay. It was just before noon, I think it was a Wednesday, and the block officer came down and told me I had a visitor—there was some people to see me, but it was too late, they were closing the visiting room for the feeding period and to be ready to go to a visit right at 1:30. And Musgrave is standing right beside me, or a few feet from me when he told me this and he told me, "When you go to the visiting room, don't go to the visiting room until I come down." So we went back ourselves for count and lock up and he came down with —this is going to be bad.
Q Did he give you some vaseline?
A Yes, sir, he did.
Q What did he tell you to do with the vaseline?
A Grease up—it's called keystring in the penitentiary. It's the most popular way of getting drugs in the penitentiary.

[p. 17]
Q Was it you were supposed to take the drugs and put it into your rectum?
A Yes, sir.
Q Did you do that?
A Yes, sir, I did.
Q Who gave you the drugs?
A Steve handed it to Musgrave and Musgrave handed it to me.
Q You did what with it?
A Over a period of five or six minutes of wiggling around and watching for cameras and cops, I got it up there.
Q Is that the way you get it back in the cell so you can later get it out and use it?
A Yes, sir, because you get strip-searched, you know, when you got back through the visiting room.
Q Okay.
A And when I got back to my cell, I got it out and he came down and got it and went up to his cell, pulled

his out, pulled a pretty good portion out for me and brought it down for me.

* * * *

[p. 28]
Q Okay. Now, did you have discussions with Musgrave while you were in the penitentiary about how he was going to set up the organization once he got outside?

* * * *

A Never come in contact with the people, just do it by mail.
Q Did he name particular people—Eddie Perkins, for instance?
A Eddie Perkins, I didn't meet him until he brought me a half ounce one night and that was a gesture on Cebe's part to keep me away from Ken Brown.
Q We'll come back to that.
A Okay.

* * * *

[p. 29]
Q Did he tell you about Kate, how she fit into this

[p. 30]
or do you know?
A When he went to the penitentiary he had two old ladies or two girls, Kate Blehm and Judy Schultz, and he told them the one that held up while he was in the joint would benefit from his release and Judy blew it and started doing a whole bunch of downers and started getting crazy shooting at people and Kate won out; and she took instructions from him through the mail and on the phone about what to do and who to take care of, to send what where.
Q He called from the penitentiary and told her?
A Two or three times a day.
Q Can you make calls like that out of the penitentiary?
A They have pay phones at the penitentiary.
Q And no one pays any attention to what they say or anything?
A No.

* * * *

[p. 33]

Q (By Mr. Snow) Okay. Let's go back to Musgrave and Kate. Did he tell you if Kate was supplying—you say you got some dope in the penitentiary from Steve and Debbie Strammel?

A Yes.

Q Did he tell you whether or not there was any connection between Steve and Debbie and Kate?

A Steve and Debbie kept their connection while he was locked up solely for the purpose of bringing him his dope when he wanted it.

Q Was Kate connected with that at all?

A She would make sure that Steve and Debbie were supplied with, you know, what they needed to sell when they were selling and what Cebe needed in the penitentiary.

Q Did you make some calls for Musgrave to Kate?

[p. 33]

A Yes, sir, I did.

Q Did he give you the phone number?

A Yes, sir, both of them.

[p. 34]

Q He gave two phone numbers?

A One where she worked at the—881-2273, at the Rustic Resort and at home, 881-2278, and that's in Belleview. I may have them numbers mixed up, but I'm not sure. It's been quite a while since I called the number.

Q So you would call and give messages to Kate also in addition to Musgrave?

A Yes.

Q Did you have any code names you were supposed to use?

A He was one, Jimmy Heath was two and I was three.

Q Did you talk about speed or did you use another word?

A Bull shit, excuse me.

Q That was the code name for the speed?

A Yes, sir.

Q And did Kate visit Musgrave often?

A Twice a week.

* * * *

[p. 49]

Q Now, who is Eddie Perkins?

A Eddie Perkins; he was unknown to me until I heard his name one night dropped by somebody that he was Cebe's new chemical man, that's the person that his main function is to buy, transport, stash and take the heat for buying chemi-

[p. 49]

cals that are restricted or that are directly related with making speed.

Q Did you have a meeting with Perkins some time?

A He came down one night. Cebe sent me down a half ounce as a bonus for the girl I got him, that Kris.

Q Was this in November or December of '75?

A Yeah.

Q Okay.

A And Eddie Perkins come down and delivered it.

Q Delivered it to you?

[p. 50]

A No, he come in kind of funny. He come in the front door of the apartment, said it was on the outside window sill of the bedroom and it was one of these—it was a basement where you couldn't roll the windows and they were roll-type windows and you couldn't roll them all the way out and I couldn't get my arm out there and Charlotte, my girl at the time, couldn't get her arm out there, so he stuck his arm out there and got it.

Q And gave it to you?

A Yes, sir, and then he did about six 180 degree turns and out the door.

* * * *

[p. 52]

Q Did you then in January of this year—did you get a regular job?

[p. 53]

A Yes, sir, I did.

Q Where?

A Continental Oil, Ramsey Engineering; subcontracting.

Q Did you discover any chemicals while you were working there?

A I sure did—discovered a whole warehouse full, but they were all the wrong chemicals.

* * * *

[p. 55]

Q During February of '76, did you see Musgrave again and find out—did he say that he still wanted any of those chemicals?

A Yes. I was living out on West 58th Avenue in Arvada, 14500 West 58th. It was a 10-acre farm that me and a friend of mine was renting—me and a friend of mine and his wife, and it was pretty excluded, had a barn. And the guy that I was living with, he worked out at Continental Oil also and he came into town looking for me on a Monday and I had just had some teeth pulled and I didn't feel like messing with anybody so I just started spacing him out—just not meeting when I was supposed to, and he chased me for three and a half days until he finally caught up with me.

Q What did he want when he caught up with you?

A Propenyl, methylamine. He wrote out on an envelope—a big manilla envelope that I still have—all the chemicals that are needed.

Q Musgrave wrote this out on the envelope?

A Yes, sir.

Q And you still have access to that envelope?

A Yes, sir, I hope. I've been away for an hour, so things are a little shaky.

* * * *

[p. 62]

Q All right. Who else? How about the Strammels?

A Steve and Debbie for a while, while he was in the penitentiary were given the opportunity to keep a speed connection while he was in jail if they agreed to deliver certain amounts of speed to him at the penitentiary or smuggle them into the penitentiary or to whatever people, you know, individuals he wanted it smuggled to.

Q You were one of those people that smuggled in, right?

A Yes.

Q Whoe else—Heath?

A Jimmy Heath, Gary Ryan and Al Reeves.

Q Ryan?

GOVERNMENT EXHIBIT 2-A

AFFIDAVIT OF ROBERT DWIGHT DUNN

September 30, 1976

APPEARANCES:

CANGES & SHAVER
By Michael Canges, Esq.
1025 Capitol Life Center
Denver, Colorado

[p. 2]

The examination of Robert Dwight Dunn, was taken on Thursday the 30th day of September, 1976, at 1025 Capitol Life Center, Denver, Colorado, commencing at the hour of 10:10 a.m., before Jerald B. Cohen, Notary Public within and for the State of Colorado.

REPORTER'S NOTE: You may note in this deposition that some portions are typed in UPPER CASE LETTERS.

When two or more persons are speaking simultaneously, the simultaneously spoken portions will be transcribed in UPPER CASE LETTERS. Should a greater need for clarity occur in the deposition, it is transcribed so that each speakers' every word, in sequence, is clearly understandable.

* * * *

[p. 3]

PROCEEDINGS

MR. COHEN: Mr. Dunn, would you raise your right hand please? Is the testimony that you are about to give, to be the truth, the whole truth and nothing but the truth, so help you God?

MR. DUNN: It is.

EXAMINATION

BY MR. CANGES:

Q. Mr. Dunn, you are, at present, in my offices. I am Michael Canges and I'm an attorney.

A. Yes sir.

Q. And we're in the Capitol Life Center. It's approximately 10:15 in the morning. What's the date . . twenty . . . .

MR. COHEN: 30th.

Q. On September 30th. Am I correct?

A. Yes sir, you are.

Q. You and I are present in my conference room. Present is Mr. Jerald Cohen, who has identified himself to you as a person authorized by the statutes of the State of Colorado as a person to administer oaths. You understand that?

[p. 3]

A. Yes sir.

Q. And you have taken an oath at this moment to tell the truth, the whole truth and nothing but the truth, have you not?

A. Yes sir, I have.

Q. You understand, Mr. Dunn, that we are on tape and what

[p. 4]

you and I discuss will be transcribed and ultimately reduced to writing, to the extent of a transcript?

A. Uh huh.

Q. What is your name please?

A. Robert Dwight Dunn.

* * * *

[p. 4]

Q. You understand that I'm Phillip Musgrave's attorney?

A. Yes sir.

Q. And you know Phillip, do you not?

A. Yes sir, I do.

* * * *

[p. 5]

Q. Alright. At the time you went to the institution, explain to me the physical location of where your cell was vis-a-vis where Phillip's cell was.

A. I was on the second tier in . . in the fish tank . . . when I

[p. 6]

first arrived. I was on the second tier on the . . . east, east two . . . east two side and Phillip was on the west three side.

Q. During THE PERIO . . .

A. WHICH WAS ALMOST just directly . . . we were . . had a direct cells, right directly across.

Q. During the period of time that you were in the institution with Phillip, did you get to know each other PRETTY WELL?

A. YES sir, we did.

* * * *

[p. 8]

Q. Now prior to your testimony to the Grand Jury, you discussed the matters that you testified to with certain law enforcement officials. Am I correct?

A. Yes sir.

Q. Who were those persons?

A. Uh . . Mr. Ronald Hollingshead and Mr. James Congrove.

Q. By whom is Mr. Hollingshead employed?

A. DEA

Q. AND WHO . . . .

A. DRUG ENFORcement Administration.

Q. Alright. That's an agency of the Federal Government?

A. Yes sir, it is.

Q. And by whom is Mr. Congrove employed?

A. Uh, Jefferson County Sheriff's Department. Uh . . investigator.

* * * *

[p. 11]

Q. Explain what you mean to me by your play.

A. Well I . . . I'm running a bluff, is what I'm doing. Is what I began and that's what I'm still doing. I hope that I can

[p. 12]
come out . . . I hope the curtail falls behind me and not on me. Uh, I told them, uh, he had about nine or ten pages of writing, this Mr. Hollingshead, on legal pad paper.

Q. What color was that paper?

A. Yellow.

Q. Alright sir.

A. Yellow lined paper. Uh, and I just commenced to making up stories. Now, now each story, I mean, each incident that I told him about, was . . . there was some, there was something in it. Like there was an incident, but I, I put an incident together with me and Phillip or me and you know, whoever. They got maybe ninety percent fairy tales and ten percent of what I'd heard.

Q. At the TIME THAT . . .

A. UH . . BUT THEY WENT for every bit of it.

Q. At the time, Mr. Dunn, that you made the statement to uh Officer Hollingshead and Officer Congrove, did they specifically ask you questions or . . .

A. Yes sir, they did. Uh, they asked me . . . phone numbers. Phillip's old phone number, in Fort Collins. Had I ever purchased any uh . . . drugs from Phillip. And I told them no. That I hadn't. Told them that I . . I had been given which I haven't. Hell, I've sold him . . I sold him items before, myself.

Q. What sort of items had you sold?

A. I sold him uh . . . a half gram of speed in 1973.

Q. The things that you told or the things you discussed.

[p. 13]
with Officers Congrove and Hollingshead, were they true?

A. No sir. Uh, ten percent was . . was true as far as I, you know, as far as I know.

* * * *

[p. 18]

Q. Now with reference to the items you testified to in front of the Grand Jury, I don't want to know specifically what you said, but was what you said basically what you had told Mr. Hollingshead or Mr. Congrove?

A. Basically, yes, but it was uh . . . Mr. Snow had a pattern

[p. 19]
of questions or had a list of questions and each time he asked me a question, I'd answer and when I'd finish that answer he . . . he'd come with another question that was really leading, you know.

Q. Did you review the questions before. . . .

A. No, sir.

Q. . . . . the Grand Jury testimony?

A. No sir.

Q. Was what you told Mr. Hollingshead and Mr. Congrove before you testified in front of the Grand Jury, was it true?

A. No sir.

Q. Alright.

A. Partially.

* * * *

[p. 22]

Q. Now, at the time of your testimony before the Grand Jury, you took an oath did you not, to tell the truth?

A. Yes sir, I did.

Q. And, in fact, did you tell the Grand Jury the truth?

[p. 23]

A. No, sir I didn't.

[p. 23]

Q. During the time that you were in the penitentiary uh did Phillip Musgrave ever give you any drugs of any sort?

A. No sir, he didn't.

Q. Were there drugs available?

A. Oh, there's plenty of drugs available in the penitentiary.

* * * *

[p. 24]

Q. Did Phillip, to your knowledge, ever help Jimmy Heath smuggle in drugs?

A. No sir.

Q. Did Phillip, to your knowledge, ever smuggle in or cause to be smuggled in drugs for any person?

A. No sir.

Q. Alright.
A. Not that I know of.

* * * *

[p.26]
Q. Alright. During the time you were in the institution uh did you ever have occasion to make telephone calls for Phillip?
A. Yes sir.
Q. And explain to me why that was or to whom those calls were made?
A. Uh they . . . us . . . in the Cell House you have two different sides of the cell house itself. You have Block A and Block B. I lived on Block B and Phillip lived on Block A. One night Block A'd be out for the night you know, TV uh cards what-

[p. 27]
ever, and phone calls and the other . . . the next night Block B would be out. Well, it was my night to be out and Phillip was locked up and I went up and was talking to him and he asked me if I would call Kate cause we had made some tarot cards.
Q. Now who is Kate?
A. Kate Blehm.
Q. And who was she?
A. Phil's uh girl.
Q. Alright.
A. Uh he asked me if I would call her and ask . . . and have her bring up a book, you know, like a tarot card book that uh shows you how to read 'em and how to understand 'em. And uh to be sure and come up and see him. Uh that was it.
Q. Was there any mention or any code with reference to drugs in any conversation with Kate Blehm?
A. No sir.
Q. Did Phillip tell you what to say to her insofar as code which might involve speed or the smuggling of drugs into the institution?
A. No sir. All he said was see . . . tell her to get me uh a tarot card book and to be sure and come up and see him.
Q. Alright. And what was the purpose or what was the meaning of the tarot card book?

A. We had made some tarot cards out of like uh like poster paper, thick paper, and Phillip's uh quite an artist uh and he

[p. 28]
drew these cards from a . . . it was a small deck of tarot cards, it was just a . . . kind of like a . . . what the hell was it? Oh, no. I'm wrong. We . . . he wanted a set of tarot cards. We had a book. That's what it was. I'm sorry, that . . . whew . . . that was my mis-

[p. 28]
take. We had a book, but we needed the cards and then that's when . . . and they wouldn't let 'em in, they wouldn't allow 'em in so Phillip draw some. That's what it was.
Q. Were you ever present at any time when Phillip gave Frank Brannan any chemicals?
A. No sir.
Q. Alright. Do you recall ever telling Mr. Hollingshead or Mr. Cosgrove or any other law enforcement officer that you were present at such a time?
A Yes sir.
Q. Alright. Was that true?
A. No sir.
Q. Do you remember whether or not there was any conversation that you were present at or that you heard about where Mr. Brannan was to give chemicals and money to Mr. Musgrave or vice versa?
A. No sir. I . . . now I told the two law enforcement officers that, you know, that I was.
Q. Was that true?
A. No sir, it wasn't.
Q. Did you ever at any time ever get a list of chemicals

[p. 29]
from Mr. Musgrave for any purpose?
A. No sir.
Q. Did Mr. Musgrave ever give you any drugs at any time?
A. No sir.

* * * *

[p. 29]

Q. At any time while you were in the institution, did Phillip ever give you a hit of speed or any drug of any sort?

A. No sir.

Q. At any time did you smuggle in drugs for Phillip?

A. No sir.

Q. Did you at any time smuggle in drugs for any other person?

A. No sir.

* * * *

[p. 35]

Q. Did you ever know Eddie Perkins?

A. Yes sir, I met him one time . . a couple times.

Q. Alright. Did you ever have any dealings with him of any sort?

A. No sir.

Q. You met him several times?

A. I don't like the individual, no sir.

Q. Alright. You had nothing to do with him?

A. No sir.

Q. Under what circumstances had you met him?

A. Uh came by my apartment on uh 925 West uh Eight Avenue one night and told me that Phillip was in town and that if I wanted to meet him for dinner, you know, meet him, and uh cause he wanted to talk to me.

* * * *

[p. 46]

Q. You've met Eddie Perkins once or twice?

A. Uh twice.

Q. And how long did each of those meetings or uh social events take place?

[p. 46]

A. With Mr. Perkins the first time, it was about three minutes. In other words, he came in and delivered a message you know, Phillip was in town and if I wanted to see and meet him for dinner. And the second time was at uh Aurora, a friend of mine's house. Went out to uh . . . I went out to sell a guy some tires and Eddie was there. Uh somethin' happened to his car. Oh, his

wife or his ex-wife took his car and he didn't have any transportation. And he was waitin' for a ride and I . . . that was no more than hello and goodbye.

Q. Did you ever have any business dealings of any sort with Mr. Perkins?

A. No sir.

Q. Did you every buy any speed from him?

A. No, but I'd sure like to sell him some.

Q. Did you sell him any?

A. No.

Q. Alright. Did you ever discuss speed with Mr. Perkins?

A. No sir.

* * * *

[p. 51]

Q. What about Steve Stramel. Did you ever know Steve Stramel?

A. Uh not knowing, by being introduced to him. I seen him one time.

Q. Where did you see him?

A. Uh him and a girl Debra, Debbie uh came up to see Phillip and I seen him across the visiting room. I was visiting with some friends of mine that came up from Denver and I just seen him from a distance. I . . . I couldn't eve . . . I doubt if I could recognize him.

Q. You never had any conversation with either Steve. . . .

A. No sir.

Q. . . . . or his girlfriend or wife, Debbie?

A. No.

[p. 52]

Q. Did you ever smuggle in drugs to the institution from Steve and Debbie?

A. No sir.

Q. Ever smuggle in drugs on behalf of Phillip or at Phillip's suggestion?

A. No sir. As a matter of fact, Phillip was uh more or less . . . well, he stayed on my case to stay out of trouble. He more or less, you know, if uh I was messin' up or getting in trouble uh he was . . . him and Steve

were the first two down on my case forit. You know, to whip me back in line cause I' . . . I'm pretty much a mess-up.

* * * *

[p. 62]

Q. All right. Who else? How about the Strammels?

A. Steve and Debbie for a while, while he was in the penitentiary were given the opportunity to keep a speed connection while he was in jail if they agreed to deliver certain amounts of speed to him at the penitentiary or smuggle them into the penitentiary or to whatever people, you know, individuals he wanted it smuggled to.

Q. You were one of those people that smuggled in, right?

A. Yes.

GOVERNMENT EXHIBIT 4-a

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 76-CR-155

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PHILLIP C. MUSGRAVE, et al., DEFENDANTS

EXCERPT OF PROCEEDINGS

(Direct Examination of Robert Dwight Dunn)

Proceedings before the HONORABLE FRED M. WINNER, Chief Judge, United States District Court for the District of Colorado, for hearing on all pending motions commencing at 11:10 a.m. on October 21, 1976, in Courtroom A, United States Courthouse, Denver, Colorado.

APPEARANCES

EDWARD W. NOTTINGHAM and ROD W. SNOW, Assistant United States Attorneys, appearing for plaintiff.

ELMER LEE HAMBY, Attorney at law, Denver, Colorado, and DAVID L. WORSTELL, Attorney at law, Denver, Colorado, appearing for the witness Robert Dwight Dunn.

E. MICHAEL CANGES, Attorney at law, Denver, Colorado, and JOSEPH SAINT-VELTRI, Attorney at law, Denver, Colorado, appearing for the defendant Phillip C. Musgrave.

WILLIAM L. KEATING, Attorney at law, Denver, Colorado, appearing for the defendants Edward G. Perkins and Charles Frank Brannon.

SHELLEY B. DON, Attorney at law, Denver, Colorado, appearing for defendant Kim L. Duleff.

[2] PROCEEDINGS (3:30 p.m.)

(Prior proceedings were had and entered of record but are not herein transcribed pursuant to direction of ordering counsel.)

MR. CANGES: Call Robert Dwight Dunn.

MR. HAMBY: Your Honor, private counsel appears with Mr. Dunn to assume the duties that I was appointed to perform. I would like to ask to be excused.

THE COURT: You may be excused, Mr. Hamby. Thank you very much.

MR. WORSTELL: Just for purposes of the record, Your Honor, my name is David Worstell, W-o-r-s-t-e-l-l, of the law office of Al Zinn; and I do represent Mr. Dunn.

THE COURT: Very well. And, of course, Mr. Worstell, you may sit somewhere up here where you are at a convenient place from which you may object, if you wish to object, as counsel for Mr. Dunn.

MR. WORSTELL: Thank you, Your Honor.

ROBERT DWIGHT DUNN, called as a witness for the defense herein, being first duly sworn on his oath testified as follows:

DIRECT EXAMINATION

BY MR. CANGES:

Q If it please the Court, for the record would you state your name and address?

[3] A Robert Dwight Dunn, 1245 South Pennsylvania.

Q Mr. Dunn, you are the same Robert Dwight Dunn that has been previously mentioned as an unindicted co-conspirator in the action entitled United States of America vs. Phillip C. Musgrave, et al., bearing Criminal Action 76-CR-155, are you not, sir?

A That's correct.

Q You had occasion at some point during the summer months of 1976 to testify before a federal grand jury.

A Yes, sir, I did.

Q And, in fact, you did so testify, did you not?

A Yes, sir.

Q Mr. Dunn, you are present in the United States District Court for the District of Colorado on the afternoon of Thursday, October 20th, am I correct?

A Yes, sir.

Q You understand where you are and who is present at this time.

A Yes, sir.

Q Do you understand that I'm Phillip C. Musgrave's attorney?

THE COURT: Let me make a recommendation to you.

MR. CANGES: Yes, sir.

THE COURT: Let's make it the 21st.

MR. CANGES: I beg your pardon, Your Honor.

[4] Q Today being October 21st and approximately 3:30 in the afternoon.

A Yes, sir.

Q Present with you in court is your attorney, am I correct?

A Yes, sir.

Q What is his name, sir, please?

A David Worstell, seated right there. (Indicating)

Q During the course of the day you have had occasion to consult with him, have you not?

A Yes, sir.

Q Are you satisfied with the advice that you have had and the representation he has given?

A Very much so.

Q You had the occasion to consult with an Elmer Lee Hamby who was appointed by this Court to represent you with reference to certain matters, am I correct?

A Yes, sir.

Q Mr. Dunn, on or about September 30, 1976, did you appear in my office at 1025 Capitol Life Center in Denver, Colorado?

A Yes, sir, I did.

Q And at that time was there present a Mr. Jerald Cohen who was a certified reporter and a notary public pursuant to the statutes of the State of Colorado.

[5] A Yes, sir, there was.

Q At that time did I ask you certain questions and did you make certain answers to those questions?

A Yes, sir, I did.

Q And at that time did you tell the truth, the whole truth, and nothing but the truth?

A I did, sir.

Q Mr. Dunn, have you had occasion to review that certain transcript or affidavit of the conversation or colloquy that transpired on September 30th?

A Yes, sir, all but about the last five or ten pages.

Q And referring to that affidavit—

MR. CANGES: For the record, that would be the affidavit that was tendered to this Court, a copy of which has been tendered to both the United States and to co-counsel.

Q Mr. Dunn, with reference to that affidavit, and now having had the occasion to again review it, are the contents of that affidavit true?

A Yes, sir.

Q With reference to your testimony before the grand jury, as I understand it, your testimony encompassed acts over a period of some several years with reference to certain statements that you made concerning alleged distribution of methamphetamines on behalf of Mr. Musgrave and other co-defendants, am I correct?

[6] A Yes, sir.

Q Was what you told the grand jury true?

A No, sir.

Q Was any part of it true?

A Possibly ten percent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 76-CR-322

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ROBERT DUNN, DEFENDANT

TRANSCRIPT OF TRIAL PROCEEDINGS—
April 13, 1977

Pursuant to recess, proceedings were resumed before the HONORABLE SHERMAN G. FINESILVER, Judge of the United States District Court for the District of Colorado, beginning at 8:35 a.m. on the 13th day of April, 1977, in Courtroom D, United States Courthouse, Denver, Colorado.

APPEARANCES:

EDWARD W. NOTTINGHAM, Assistant United States Attorney, Denver, Colorado, appearing for the plaintiff.

DANIEL J. SEARS, Federal Public Defender, Denver, Colorado, appearing for the defendant.

[OFFER OF DEFENDANT'S EXHIBITS F-1 AND F-2, OBJECTION TO PLAINTIFF'S EXHIBIT 2]

[T. Vol. II, p. 21]

MR. SEARS: Your Honor, I might state for the record that the offer of Defendant's Exhibits F-1 and F-2 are with regard to the immunity granted to Robert Dwight Dunn, which the defense would submit immunizes the submission of Plaintiff's Exhibit 2, which has not been offered yet, but as a matter of foundation, which we submit is an indirect result of the immunity afforded Mr. Dunn before the Federal Grand Jury.

THE COURT: Any objection?

MR. NOTTINGHAM: I still object to the relevancy, Your Honor. I don't think this immunizes him from a perjury charge, so I am still saying that they are not relevant to this proceeding.

THE COURT: The Court will admit the court file as identified. The Court will admit in evidence Defendant's Exhibits F-1 and F-2.

* * * *

[OFFER AND OBJECTION TO PLAINTIFF'S EXHIBIT 1]

[T. Vol. II, p. 41]

MR. NOTTINGHAM: Your Honor, at this time I am going to tender a document which has been marked Plaintiff's Exhibit 1 which purports to be the testimony of Robert Dwight Dunn before the Federal Grand Jury, and bears the certificate at the end of that testimony of Terri L. Bryant, Special Court Reporter of the Grand Jury of the United States.

THE COURT: Is that the totality?

MR. NOTTINGHAM: It is the totality of Mr. Dunn's grand jury testimony, Your Honor, and I would offer that at this time, based on the certificate of Terri Bryant.

THE COURT: Mr. Sears, your position, please?

MR. SEARS: May I have just a moment, please?

THE COURT: Please.

MR. SEARS: Your Honor, with regard to the authenticity of the document, the defense has no specific objection. We do object to the admission of the document on the ground, again, of the immunity order tendered to the Court, and on Mr. Dunn's fifth amendment grounds.

THE COURT: The Court will note the objection. The objection will be overruled on that basis, please.

* * * *

[STIPULATION TO DEFENDANT'S EXHIBITS F-1 AND F-2]

[T. Vol. II, p. 42]

MR. SEARS: Your Honor, might I also ask, without the necessity of calling Miss Bryant, whether the Government would be willing to stipulate that Defendant's Exhibits F-1 and F-2 that were tendered to the Court were entered by Judge Arraj prior to the grand jury proceedings, in other words, directly related to the grand jury proceedings.

MR. NOTTINGHAM: Without waiving my prior objection, I would so stipulate.

THE COURT: The record will so reflect.

Ladies and gentlemen, when the attorneys stipulate as to a matter, you may consider that evidence in the case. Do you understand that, please?

The stipulation is, as I understand, that the immunity was entered by Chief Judge Arraj prior to the time of the presentation of testimony.

MR. NOTTINGHAM: So stipulated.

MR. SEARS: That's correct.

* * * *

[T. Vol. II, p. 43-44]

DIRECT EXAMINATION OF ROD SNOW,

called as a witness by the plaintiff, being first duly sworn on his oath, testified as follows:

THE COURT: What is your name, please?

THE WITNESS: Rod Snow.

THE COURT: Your profession, please?

THE WITNESS: I am employed in the U.S. Attorney's office.

THE COURT: You are an attorney by profession, is that correct?

THE WITNESS: Yes, sir.

THE COURT: Are you employed by any agency, please?

THE WITNESS: Yes, sir, by the U.S. Attorney's office, here in Denver.

THE COURT: Your title?

THE WITNESS: I am Assistant United States Attorney.

THE COURT: In brief, what are your duties in that regard, please, that related to trials or activities with the grand jury?

THE WITNESS: I am currently assigned to the criminal area of law, and I participate with the grand jury in investigating crime, and also in prosecuting indictments that are returned by the grand jury.

THE COURT: Proceed, please.

DIRECT EXAMINATION

BY MR. NOTTINGHAM:

Q Mr. Snow, how long have you been employed as an Assistant United States Attorney?

A About a year and a quarter.

Q Would you describe what your connection was with the case of United States v. Musgrave?

A Yes, sir. I participated with the agents in investigating the case, in presenting certain matters to the grand jury, and in prosecuting after the indictment was returned.

Q All right. Have you had an opportunity to review the grand jury transcript?

A You mean today?

Q Not today, but did you have an opportunity to review the grand jury transcript after it was made?

A Yes.

Q I will hand you what's been marked as Exhibit 1, Plaintiff's Exhibit 1, and ask you to identify that.

A It appears to be the transcript of one of the hearings from a witness that I presented to the grand jury.

* * * *

CROSS EXAMINATION OF ROD SNOW

[T. Vol. II, p. 64-65]

Q Were you present when a representation was made at that time by you and/or Mr. Hollingshead that you could in large part corroborate all of Mr. Dunn's testimony before the Federal Grand Jury?

A Yes.

Q Do you still believe that today but for Mr. Dunn's statements to the contrary?

A Could I do it today or could I have done it then?

Q Do you have any knowledge that would tend to refute Mr. Dunn's testimony before the Federal Grand Jury, other than the statements made by him personally?

A No.

Q All right. Now, with regard to Mr. Musgrave smuggling speed into the penitentiary, did your investigation present you with independent evidence that Mr. Musgrave was in fact smuggling speed into the penitentiary?

A There was testimony, other testimony by other people, to that effect, yes, sir.

* * * *

[T. Vol. II, p. 66-67]

Q (By Mr. Sears) Were you aware of an incident where Kate Blehm was detected smuggling what was believed to be speed in to Mr. Musgrave, and she thereby lost her visiting privileges?

A Yes. I knew she lost her visiting privileges.

* * * *

Q (By Mr. Sears) Mr. Snow, in your investigation, did you have independent corroborative information indicating that the Strammels were involved in smuggling speed into the penitentiary to Mr. Musgrave?

A Yes, sir.

Q Did you also have independent evidence that Mr. Dunn had been detected at the Colorado State Penitentiary for concealing some speed in his rectum, which was subsequently detected by a Dr. Doanes at the Colorado State Penitentiary?

A I don't recall anything about Dr. Doanes detecting it.

Q Were you aware of the incident where Mr. Dunn was detected with having speed detected or concealed in his rectum at the Colorado State Penitentiary, regardless of whether it concerned Dr. Doanes or not?

MR. NOTTINGHAM: Your Honor, may counsel approach the bench?

THE COURT: Let's go ahead, please.

A I don't recall that.

* * * *

[T. Vol. II, p. 68-70]

Q Was Mr. Dunn, based on your investigation, a gofer for Mr. Musgrave?

A Was Mr. Dunn?

Q Yes.

A Yes.

Q Did you have other evidence independently corroborating that?

A No.

Q Other than Mr. Dunn's statement, did you have other evidence refuting that?

A No.

Q All right. Mr. Snow, I believe in your overt acts you allege that a great number of phone calls were placed from the phone numbers 881-2273 at the Rustic Resort and 881-2278 in Belleview.

Did you have occasion to confirm with the telephone company or Mountain Bell, as to whom those two numbers listed?

A As to whom the two telephone numbers were listed?

Q Yes.

A Yes, I'm sure.

Q And as you alleged in the indictment and as Mr. Dunn testified before the Federal Grand Jury, isn't it a fact that your independent investigation with Mountain Bell indicated that 881-2273 listed to the Rustic Resort and that 881-2278 in fact listed to Katherine or Kate Blehm?

A I don't remember the specific telephone number, but it did confirm that they did list to whom they were told they were listed to.

Q And your investigation did confirm that Kate or Katherine Blehm was the girlfriend of Phillip Musgrave?

A Yes, sir.

Q Did your investigation confirm whether or not Robert Dunn, at the time of Mr. Dunn's testimony before the Federal Grand Jury, was in fact living on West 58th Avenue in Arvada, to your recollection?

A Did I confirm where he lived when he testified before the grand jury?

Q You or the Drug Enforcement Administration transmitting such information to you in the course of the preparation of the case.

A I presume we did confirm it. I don't have an independent recollection as to the address.

* * * *

[T. Vol. II, p. 70-71]

Q (By Mr. Sears) Mr. Perkins never specifically denied that he delivered drugs to Robert Dunn from Phillip Musgrave in November or December of 1975?

A Mr. Perkins, to me, in a one-on-one confrontation, no.

Q The basis of, by virtue of his not guilty plea, that plea was with regard to the conspiracy charge, and all the overt acts charged to him, that was the not guilty plea entered, was it not?

A Yes, sir.

Q And that dealt with much more than simply a delivery to Mr. Dunn in November or December of 1975?

A Yes, sir.

Q Mr. Snow, you had occasion to review the statement to Michael Canges on September 30, 1976?

A This morning or when I was given it last fall or—

Q You have reviewed it?

A I know the contents of this document, yes, the general content.

Q Mr. Snow, at page 29 of what has been marked, I believe, as Plaintiff's Exhibit 2, is there a statement

there made to the effect that Phillip Musgrave never gave me any drugs at any time?

A Yes, sir.

Q Through the course of your investigation—we are talking about the statement to Mr. Canges.

A Yes, sir.

Q Through the course of your investigation, did you have information that refuted that statement?

A Testimony from Mr. Dunn, yes.

Q Any other independent evidence, to your recollection?

A Mr. Dunn was the sole source of that area of testimony, as I recall.

* * * *

[OBJECTION TO GOVERNMENT EXHIBIT 4-a]

[T. Vol. II, p. 80-81]

MR. NOTTINGHAM: This is a transcript of certain proceedings before Judge Winner on October 21, 1976.

THE COURT: Let's have this marked as an exhibit, so that we are all talking about the same document. Will you do that, please.

What is your position, Mr. Nottingham, please?

MR. NOTTINGHAM: Your Honor, I haven't had an opportunity to go through and excerpt the irrelevant portions of this transcript. Again, I would submit that this transcript is admissible as it bears—

THE COURT: I am sure that counsel is not questioning the authenticity.

MR. SEARS: No.

THE COURT: That's correct. Let's go. There is a proper certification. Let's have a marshal in here, please. Let's have a marshal throughout the trial, would you, please.

You are tendering part of this transcript, is that correct, please?

MR. NOTTINGHAM: That's correct.

THE COURT: All right. Let's go ahead. Any objections? If there are, state them, please.

MR. SEARS: Yes, I do, Your Honor. First of all, any of the statements or declarations made by Mr. Dunn in that proceeding are not charged in this indictment, and I submit they are immaterial and irrelevant.

* * * *

[MOTION FOR JUDGMENT OF ACQUITTAL]

[T. Vol. II, p. 96-98]

Second of all, Your Honor, I would move for judgment of acquittal on this case due to the fact that as defendant's exhibits tendered before this Court—I don't recall the specific marking—but the motion for order of immunity and order of immunity indicate that the testimony of Robert Dunn before the Federal Grand Jury cannot be used to establish a corpus delicti in an inconsistent declarations case.

I specifically cite to the Court the case of *United States* v. *Patrick*, 542 F.2d 381, a Seventh Circuit 1976 case, that said specifically that in an inconsistent declarations case immunized testimony in a grand jury proceeding, testimony granted pursuant to 18 United States Code, Sections 6002 to 6003, and any subsequent statements made pursuant to an order of immunity—in that case, there were three separate immunity orders, three separate proceedings before the Federal District Court—inconsistent declarations cannot be used when the testimony results from immunized testimony in an inconsistent declarations case.

The Court in *Patrick* holds that 6002 and 6003 simply does not encompass inconsistent declarations prosecution, only where the prosecution is under subsection (a) of 1623 or 1621 it would be warranted. And I tender to the Court a trial brief on that matter.

I secondly move for judgment of acquittal on the basis that there is no inconsistent declaration in a proceeding ancillary or before any Federal District Court or Federal Grand Jury, in the statement to Attorney Canges. Mr. Cohen stated very specifically that he did not comply with the Federal Deposition Rules in a criminal proceeding, it was merely a statement, and on the face of Plaintiff's Exhibit 2 it shows that Jerald Cohen is a

reporter for the State and District of Colorado. There is no indication that he was sworn as a reporter for the Federal District Court in the District of Colorado, there is no indication that he meets the standards set by the Judicial Conference as promulgated in the statutes I cited to you before, and I think most telling was Mr. Nottingham's statement that this was a private proceeding before an attorney.

If the Court goes this far to extend an inconsistent declarations case to cover any private statement given to any attorney privately, I submit that is beyond the intent and the spirit of 1623, inconsistent declarations prosecutions.

I would also tender a written brief, a motion for judgment of acquittal, and there is simply not a proceeding based on the Canges statement and a proceeding ancillary to or before any Federal Court or grand jury.

Let the record show that I am tendering copies of the motion and brief to the prosecuting attorney.

* * * *

[OBJECTIONS TO GOVERNMENT'S EXHIBITS 1-a, 2-a AND 4-a]

[T. Vol. II, p. 113-114]

THE COURT: The Court will deny the motion, renewed motions for judgment of acquittal. The Court at this time will note the objection of Mr. Sears to the Court's admitting in evidence the following exhibits, to-wit: 1-A, which is an excerpt from the testimony of Mr. Dunn before the grand jury; 4-A, which are excerpts from the proceedings before Chief Judge Winner.

What is the number of the so-called affidavit before Mr. Cohen?

Mr. Sears, I will note your objections to 1-A, 4-A, 2-A. Your objection will be noted and overruled. The Court intends to submit these documents to the jury.

MR. NOTTINGHAM: Your Honor, excuse me. For the record, may we also note that the Government's theory of this case is relying on 18 United States Code, Section 1623 (c), and that the Government intends to present its case on the basis of inconsistent declarations in proceedings ancillary to a U. S. Court or a Federal Grand Jury proceeding.

THE COURT: Do I understand that you are proceeding, Mr. Nottingham, on the provisions of the statute, 1623 (c).

MR. NOTTINGHAM: That is the theory of our proof, Your Honor, yes, sir.

THE COURT: This is the theory of your case, is that correct?

MR. NOTTINGHAM: That's correct. We are proving our case as permitted by 1623 (c).

* * * *

[EXCERPT FROM PLAINTIFF'S CLOSING ARGUMENT]

[T. Vol. II, p. 168]

You will be instructed, and I would like to quote this, and ask you to listen carefully for this instruction. You will be instructed in part, that it is not necessary for the evidence to show which of the declarations in each count was in fact false.

The only necessity is that the statement under oath be irreconcilably contradictory, that is, irreconcilably contradictory declarations. So, we don't have to try to prove that his grand jury testimony was false, but whether his subsequent affidavit to the defense attorney was false. That's all that mass of testimony would go to, is which one is really true. We don't have to prove that. All we have to prove is the inconsistent statements.

* * * *

[EXCERPT FROM TRIAL COURT'S INSTRUCTIONS]

[T. Vol. II, p. 178-179]

As the Court has read to you, ladies and gentlemen, the statute or federal law that is referred to in the indictment is Title 18, United States Code, Section 1623, and it provides in part that whoever under oath in any

proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration, shall be guilty of an offense.

There are five essential elements required to be proved in order to establish each of the counts charged in the indictment. I would like to outline these for you, ladies and gentlemen.

First, the defendant had made two or more declarations which are inconsistent to the degree that one of them is necessarily false.

Second, said declarations were given in proceedings before or ancillary to a court or grand jury of the United States.

Third, said declarations were made under oath.

Fourth, said declarations were known by the defendant to be falsely inconsistent when made.

Fifth, that testimony in each proceeding must be material to the crime charged or under investigation.

These are the five elements, do you understand that, ladies and gentlemen?

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 76-CR-322

[Title Omitted in Printing]

MOTION FOR JUDGMENT OF ACQUITTAL—
Filed April 13, 1977

The indictment in the above case charges the defendant with five (5) counts of making false declarations before a grand jury or court in violation of 18 United States Code, Section 1623 (as amended, 1970). More specifically, in paragraph 6 of each count, the indictment alleges, in part, that "[t]he aforesaid declarations by Robert Dunn . . . were inconsistent to the degree that one of said declarations was false and known by him to be false when made."

Title 18, United States Code, Section 1623 provides, in part, as follows:

> "Whoever under oath in any proceeding *before or ancillary to any court or grand jury of the United States* knowingly makes any false material declaration . . ."

shall be guilty of an offense against the United States. Title 18, United States Code, Section 1623(a) (as amended, 1970).

Title 18, U.S.C. § 1623(c) provides, in part, as follows:

> "An indictment or information for violation of this section alleging that, *in any proceedings before or ancillary to any court or grand jury of the United States*, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false . . ." Title 18, United States Code, Section 1623(c) (as amended, 1970) (Emphasis added.)

ARGUMENT

THE SWORN STATEMENT BEFORE JERALD B. COHEN ON SEPTEMBER 30, 1976, DOES NOT QUALIFY AS A "PROCEEDINGS BEFORE OR ANCILLARY TO ANY COURT OR GRAND JURY OF THE UNITED STATES."

Title 18 U.S.C. § 1623(c) requires that the inconsistent declarations be made under oath "in any proceedings *before or ancillary to any court or grand jury of the United States* . . ." Title 18, United States Code, Section 1623(c) (as amended, 1970) (Emphasis added.)

The legislative history to 18 U.S.C. § 1623(c) indicates an intent by Congress "to facilitate Federal perjury prosecutions and establish a new false declaration provision applicable in *Federal grand jury and court proceedings.*" *U.S. Code Cong. and Adm. News*, 1970 Session, Vol. II, p. 4008 (Emphasis added.)

A plain reading of the statute and the legislative history indicates no intent to extend inconsistent declarations prosecutions to statements or declarations made in proceedings other than before or ancillary to federal grand jury or court proceedings.

A sworn affidavit taken in a private attorney's office by a shorthand reporter who is a "Notary Public within and for the State of Colorado" simply does not qualify. (See Affidavit of Robert Dwight Dunn, September 30, 1976, p. 2). Mr. Cohen may be a "certified shorthand reporter" within the definition of C.R.S. 1973 § 12-63-102; but unless he has been sworn and qualifies pursuant to Title 28, United States Code, § 753, he is not a reporter for the United States District Court for the District of Colorado. See *United States* v. *Doshen*, 133 F.2d 757 (3rd Cir. 1943).

Notwithstanding, the mere taking of a sworn statement is not a proceedings before or ancillary to any court or grand jury of the United States. In 1970, Congress created a procedure for taking depositions in criminal cases in federal courts. 18 U.S.C. § 3503. If such a procedure had been followed, a deposition might qualify.

See *U.S. Code Cong. and Adm. News*, 1970 Session, Vol. II, p. 4009; *United States* v. *King*, —— F.2d ——, 20 Cr.L.Rptr., 2348 (9th Cir. December 16, 1976).

To gain some idea as to a definition of what "proceedings before or ancillary to a court or grand jury of the United States" are, we may look to 18 U.S.C. § 6002. Since it is not defined in § 1623 but is closely related to immunity proceedings under §§ 6002-6003, the same definitions may assumedly apply. The same phraseology is used in both sections.

Title 18 U.S.C. § 6001(4) defines "court of the United States" as follows:

> "'Court of the United States' means any of the following courts: the Supreme Court of the United States, a United States court of appeals, a United States district court established under chapter 5, title 28, United States Code, the District of Columbia Court of Appeals, the Superior Court of the District of Columbia, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Claims, the United States Court of Customs and Patent Appeals, the Tax Court of the United States, the Customs Court, and the Court of Military Appeals."

Though there does not appear to be any provision in the federal statutes defining "grand jury of the United States," the provisions concerning the impaneling of a grand jury, 18 U.S.C. § 3321, whether it be a regular statutory grand jury or a special grand jury, 18 U.S.C. § 3331 *et seq.*, seems to make clear that such a body is a creature of the federal district court in the judicial district in which such body sits. See Rule 6, *Federal Rules of Criminal Procedure.* The scope of a grand jury's duties is set out in 18 U.S.C. § 3332.

We must next determine what proceedings would be considered "ancillary to" a court or grand jury of the United States. The common definition of "ancillary" is found to be subordinate, subsidiary, auxillary, supplementary. *Webster's Third New Instructional Dictionary*, 1971. The only federal decision found defining the term

adopts the meanings "auxillary" or "subordinate." *Johnson* v. *Thomas*, 16 F.Supp. 1019 (N.D. Tex. 1936).

The defendant contends that an individual act by an attorney calling a witness in to swear to an affidavit cannot be considered to be a "proceeding before or ancillary to a court or grand jury of the United States." Penal statutes are to be strictly construed. *Bronston* v. *United States*, 409 U.S. 352 93 S.Ct. 595, 34 L.Ed.2d 568 (1973). Such an interpretation, the defendant submits, is overbroad.

Respectfully submitted,

/s/ Daniel J. Sears
DANIEL J. SEARS
Federal Public Defender

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 76-CR-322

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ROBERT DUNN, DEFENDANT

TRIAL BRIEF—Filed April 13, 1977

The indictment in the above case charges the defendant with five (5) counts of making false declarations before a grand jury or court in violation of 18 United States Code, Section 1623 (as amended, 1970). More specifically, in paragraph 6 of each count, the indictment alleges, in part, that "[t]he aforesaid declarations by Robert Dunn . . . were inconsistent to the degree that one of said declarations was false and known by him to be false when made."

Title 18, United States Code, Section 1623 provides, in part, as follows:

> "Whoever under oath in any proceeding *before or ancillary to any court or grand jury of the United States* knowingly makes any false material declaration . . ."

shall be guilty of an offense against the United States. Title 18, United States Code, Section 1623(a) (as amended, 1970).

Title 18, U.S.C. § 1623(c) provides, in part, as follows:

> "An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are *inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false* . . ." Title 18, United States Code, Section 1623(c) (as amended, 1970) (Emphasis added.)

ARGUMENT

THE DEFENDANT'S IMMUNIZED TESTIMONY BEFORE THE FEDERAL GRAND JURY CANNOT BE USED AGAINST HIM IN AN INCONSISTENT DECLARATIONS PROSECUTION.

Paragraph one of each count of the indictment in the present case alleges that "[o]n June 16, 1976, at Denver, in the District of Colorado, Robert Dunn, while under oath as a witness in a proceeding before a Grand Jury of the United States in the District of Colorado, did knowingly make a false material declaration, as more fully set forth in paragraphs 2 through 6 of this Count . . ." Accordingly, paragraph 4 of each count alleges "[a]t the time and place aforesaid, Robert Dunn, while under oath, did knowingly declare before the Grand Jury with respect to the aforesaid material matter as follows . . ." and proceeds to allege specific declarations made before the Grand Jury.

In paragraph 6 of each count, the indictment alleges that "[t]he aforesaid declarations by Robert Dunn, as set forth in paragraphs four (4) and five (5) of this Count — were inconsistent to the degree that one of said declarations was false and known by him to be false when made." It is therefore quite clear that the declarations made by the defendant before the Federal Grand Jury sitting at Denver, Colorado, on June 16, 1976, are relied upon by the government, in part, to make out its case of inconsistent false declaration under 18 U.S.C. § 1623(c).

Evidence has been introduced to show that the defendant, Robert Dwight Dunn, was called to testify before said grand jury on June 16, 1976, by the U.S. Government. The defendant, having been sworn, stated his name and was thereupon advised of his right to remain silent and his right to counsel. Immediately thereafter, government counsel asked the defendant about his knowledge and activities with Phillip Musgrave to which the defendant responded by claiming his privilege against self-incrimination. The defendant was thereupon taken

before the Honorable Alfred A. Arraj and, upon presentation of an application for immunity under 18 U.S.C. §§ 6002 and 6003 by the United States, an order of use immunity was entered.

Title 18, United States Code, Section 6002 provides as follows:

> "Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but *no testimony or other information compelled under the order* (or any information directly or indirectly derived from such testimony or other information) *may be used against the witness in any criminal case*, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. (Emphasis added.)

Though immunity granted under §§ 6002-6003 is use immunity, as compared to the former transactional immunity, *Tierney* v. *United States*, 409 U.S. 1232, 93 S.Ct. 17, 34 L.Ed.2d 37 (1972); *Kastigar* v. *United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), use immunity is co-extensive with the Fifth Amendment privilege and must be asserted in any criminal proceedings brought against a defendant based upon or derived from the immunized testimony. *United States* v. *Cappetto*, 502 F.2d 1351 (7th Cir. 1974) *cert. den.*, 420 U.S. 925; *Goldberg* v. *United States*, 472 F.2d 513 (2nd Cir. 1973).

Title 18 U.S.C. § 6002 protects a witness from use of the immunized testimony against him in any criminal

case, "*except* a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." 18 U.S.C. § 6002 (Emphasis added.) The immunized testimony, however, *cannot* be used as a basis for an inconsistent declarations prosecution under 18 U.S.C. § 1623(c).

The distinguishing feature of a § 1623(c) prosecution from a § 1623(a) or § 1621 prosecution is that the government, in the former, need not prove the falsity of any allegedly inconsistent declarations. It need only demonstrate that the defendant made two or more declarations under oath which were inconsistent to the degree that one of them is necessarily false. See footnote 3, *United States* v. *Patrick*, 542 F.2d 381, 384 (7th Cir. 1976).

Immunized testimony may *not* be used to establish the *corpus delicti* of an inconsistent declarations prosecution. *United States* v. *Patrick*, *supra*, at p. 385.

> "We believe such use was not intended by Congress to come within the exception found in 6002 that the compelled testimony may be used in 'a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.'" 542 F.2d at p. 385.

Many decisions similarly hold that a witness can't be compelled to testify before a federal grand jury under an order of immunity only to worry about inconsistent false declarations he may have made or will make under 18 U.S.C. § 1001. *United States* v. *Watkins*, 505 F.2d 545 (7th Cir. 1974); *United States* v. *Alter*, 482 F.2d 1016 (9th Cir. 1973); *United States* v. *Doe*, 361 F.Supp. 226 (E.D. Pa. 1973) *aff'd.* 485 F.2d 682 (3rd Cir. 1973) *cert. den.*, 415 U.S. 989. It is generally agreed that it is perjury committed in contravention of the immunity order that is expected for use. *United States* v. *Tramunti*, 500 F.2d 1334, 1342-44 (2nd Cir. 1974); *United States* v. *Patrick*, *supra* at p. 385.

> "To interpret this perjury exception to include a prosecution under § 1623(c) for inconsistent statements, *some* of which were made prior to the latest grant of immunity, would be too broad of a reading of § 6002." 542 F.2d at p. 385.

A similar holding was entered in *People* v. *Denson*, 59 Ill.2d 546, 322 N.E.2d 464 (1975). Dunn was not ordered by Judge Arraj to testify truthfully before Attorney Canges. The immunity order applied only to the grand jury proceedings.

Even if the government establishes that the inconsistent statement made before a court or grand jury *was false when made*, this will still not save a prosecution under 18 U.S.C. § 1623(c). See *United States* v. *Bell*, 371 F.Supp. 220, 224 (E.D. Tex. 1973).

Respectfully submitted,

/s/ Daniel J. Sears
DANIEL J. SEARS
Federal Public Defender

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 76-CR-322

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ROBERT DUNN, DEFENDANT

REPLY BRIEF—Filed May 19, 1977

ARGUMENT

I

IMMUNIZED TESTIMONY MAY NOT BE USED TO ESTABLISH THE *CORPUS DELICTI* IN AN INCONSISTENT DECLARATIONS PROSECUTION.

United States v. *Patrick*, 542 F.2d 381 (7th Cir. 1976) very clearly holds that testimony immunized under 18 U.S.C. §§ 6002-6003 may not be used to establish the *corpus delicti* in an inconsistent declarations prosecution under 18 U.S.C. § 1623(c). The defendant submits that the only way that such immunized testimony can be used is if the government attempts to establish that the defendant perjured himself before the grand jury *in violation of the order of immunity*. But when the government committed itself to an inconsistent declarations theory not proving which of the two declarations was false (the Canges statement or the grand jury testimony), then the *Patrick* holding becomes very significant.

II

THE CANGES STATEMENT WAS NOT A PROCEEDING BEFORE OR ANCILLARY TO A COURT OR GRAND JURY OF THE UNITED STATES.

The defendant stands on the authorities and argument submitted in its Trial Brief with the further statement that, contrary to the government's assertion, defendant does *not* concede that a deposition is a proceeding with the provisions of § 1623(c). The defendant submits a deposition complying with 18 U.S.C. § 3503 would have presented a much closer question. But certainly a recorded statement taken in an attorney's office does not qualify under the statute.

Respectfully submitted,

/s/ Daniel J. Sears
DANIEL J. SEARS
Federal Public Defender

[Certificate of Service (Omitted in Printing)]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 77-1398

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

ROBERT DUNN, DEFENDANT-APPELLANT

FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

(D.C. No. 76-CR-322)

OPINION—June 5, 1978

Daniel J. Sears, Federal Public Defender, for appellant.

Edward F. Nottingham, Asst. U. S. Attorney, (with Joseph F. Dolan, U. S. Attorney, on the brief) for appellee.

Before BARRETT, DOYLE, LOGAN, Circuit Judges

BARRETT, Circuit Judge

Robert Dunn appeals from his conviction of making false statements before a grand jury in violation of 18 U.S.C. § 1623.

FACTUAL BACKGROUND:

In June 1976, under a grant of immunity pursuant to 18 U.S.C. § 6002, Dunn presented testimony to a grand jury investigating illegal drug activity in the Colorado State Penitentiary. Dunn's testimony implicated Phillip Musgrave in the crimes under investigation. Following the grand jury proceeding, Musgrave and others were indicted on charges of conspiring to manufacture and distribute controlled substances. (United States v. Musgrave, et al, No. 76-Cr-155.)

Subsequently, in September 1976, Dunn appeared in the office of Michael Canges, attorney for Phillip Musgrave. In the presence of Canges and Gerald Cohen, a notary public, Dunn gave an oral statement under oath which was recorded and transcribed wherein he recanted his grand jury testimony implicating Musgrave. (Vol. I at 74-83; Vol. II at 144-147). Dunn stated that much of what he had previously told the grand jury was not true. (Vol. I at 68-73). At the time Dunn made the statement, he was not represented by counsel. However, there is nothing in the record which indicates that Dunn could not have appeared with counsel or that his statement was not completely voluntary. Dunn was fully cognizant that Canges was representing Musgrave.

Thereafter, Michael Canges notified the United States Attorneys' office of Dunn's recantation of his grand jury testimony. Canges filed a transcript of Dunn's sworn statement with the district court wherein the *Musgrave* prosecution was pending. Motions were filed on behalf of Musgrave and others challenging the indictments on the basis that such indictments had been returned predicated on false grand jury testimony. An evidentiary hearing on these motions was held before Judge Winner in October 1976. At that time Dunn, who was then represented by counsel, reaffirmed under oath that he had lied to the grand jury. His testimony of course, was duly reported and transcribed. As a result, the charges against Musgrave were subsequently reduced.

Thereafter, Dunn was indicted and charged with five counts of making false statements to a grand jury in violation of 18 U.S.C. § 1623. The evidence against Dunn

admitted at trial included: Dunn's grand jury testimony, Dunn's Canges statement, and relevant portions of Dunn's testimony at the Musgrave motion hearing. At Dunn's trial, testimony was given by the notary public who had administered the oath to Dunn in Canges' office, and by the United States Attorney in charge of the grand jury proceeding. The jury found Dunn guilty on three counts of perjury before the grand jury.

On appeal Dunn contends that the trial court erred in 1) ruling that the proceeding in Canges' office was a proceeding ancillary to a court or grand jury of the United States, and 2) ruling that immunized grand jury testimony could be used to establish the *corpus delecti* in an inconsistent declarations prosecution.

PRELIMINARY DISCUSSION:

Before proceeding to the specific issues at hand, it is necessary to discuss in some detail the pertinent statutes and the indictment as drafted against Dunn, as such have a significant bearing upon the specific issues raised on appeal.

18 U.S.C. § 1623, captioned "False Declarations Before a Grand Jury or Court" provides that:

> "(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information . . . knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 U.S.C. § 1623(c), outlines a statutory method of charging a witness with violating § 1623(a):

> "(c) An indictment or information for violation of this section alleging that in any proceeding before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false *need not specify which declaration is false* . . ."

In addition, § 1623(c) sets forth a method for proving false declarations:

> "In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury."

Thus, § 2623(c) eliminates the two witness rule which is otherwise required to prove perjury. The government need not prove which of the declarations was false through extrinsic evidence, but rather, the falsity of one of the two declarations is inferred from their inconsistency with each other. United States v. Slawik, 548 F.2d 75 (3rd Cir. 1977); United States v. Patrick, 542 F.2d 381 (7th Cir. 1976), cert. denied 430 U.S. 931.

Turning now to the government's indictment of Dunn, all counts of the indictment read that:

> "On June 16, 1976, at Denver in the District of Colorado, ROBERT DUNN, while under oath as a witness in a proceeding before a grand jury of the United States in the District of Colorado, did knowingly make a false material declaration . . . in violation of Title 18, U.S.C. § 1623."

The indictment quotes the appropriate portions of Dunn's initial grand jury testimony from a certified transcript wherein Dunn made statements implicating Musgrave. The indictment also quotes statements contradicting Dunn's grand jury testimony made in Canges' office. The concluding portion of each count against Dunn included this language:

> "6. The aforesaid declarations by ROBERT DUNN, as set forth in paragraphs (4) and (5) of this count were inconsistent to the degree that one of said declarations was false and known by him to be false when made."

In the preliminary stages of the proceedings below, Dunn moved for a bill of particulars to determine which

statements the government intended to prove were false. The need for clarification is obvious. As quoted above, each count of the indictment specified that during Dunn's appearance before the grand jury in June, 1976 he knowingly made false material declarations. On the other hand, the concluding portion of each count indicated that the government was relying on 18 U.S.C. § 1623(c), where, as explained above, inconsistencies between Dunn's grand jury testimony and Dunn's Canges statement would be sufficient to prove the falsity of one or the other of them.

In response to Dunn's request for a bill of particulars, the government claimed to rely upon § 1623(c). The government and Dunn proceeded upon this theory of the case. For example, Dunn's counsel properly concluded that evidence to show that Dunn's June grand jury testimony was in fact true would be irrelevant in a § 1623 (c) prosecution. (Vol. II at 87, 113-114, 127-128, 153, 168). Of course, if the government had not chosen to proceed upon the inconsistent declarations theory, the government would have had to state which statements it intended to prove false, and Dunn's defense would have been to demonstrate that in fact such specified testimony was true. In addition, the jury was properly instructed that under 1623(c) the jury need not find which of the statements, that is, Dunn's June grand jury testimony or Dunn's Canges statement, was false, but rather that the jury need only find that the statements were so inconsistent that one had to be false. (Vol. II at 179).

CANGES' STATEMENT

Dunn's first argument is that the proceedings in Canges' office did not constitute a proceeding ancillary to a grand jury or court proceeding so as to come within the meaning of § 1623(a) and (c).

The term "ancillary proceeding" has seldom been construed. Nor has the question of what other statement may be used to show inconsistency with grand jury testimony. "Ancillary proceeding" is generally defined as "one subordinate to or in aid of another primary action". Black's Law Dictionary (4th Ed. 1968) at 112.

In the absence of a clear meaning for the term "ancillary proceeding", Dunn argues that his statement made in Canges' office was not taken in a proceeding before or ancillary to the grand jury. He argues that Gerald Cohen was not an officer for the United States District Court for the District of Colorado such that a statement taken by him could be ancillary to the federal court proceedings in *United States* v. *Musgrave*, and stresses that he was not advised of his rights nor was counsel present. Dunn analogizes to 18 U.S.C. § 3503, which provides the method for taking depositions of unavailable witnesses, and implies that procedures more closely adherent to those outlined in § 3503 may be found to be ancillary to a grand jury proceeding.

On the other hand, the government submits that Dunn's affidavit in Canges' office was taken in a proceeding ancillary to the grand jury proceeding, where the testimony was given under oath, administered by a notary public authorized to do so, where the testimony was taken in the office of an attorney of a defendant in a federal court proceeding, and where the affidavit was filed in that court proceeding and influenced the outcome of that proceeding.

This court has concluded that while the Canges statement is "ancillary", in the sense that it is connected to and had an effect upon the grand jury proceeding, the event occurring in Canges' office, in and of itself, is not a "proceeding" within the meaning of the statute so as to be a proceeding ancillary to a grand jury proceeding. Despite the administration of the oath and presence of the notary public, we hold that the event lacks the degree of formality the statute requires.

The court further concludes that Dunn's subsequent affirmation of his Canges statement, in the course of the hearing conducted in the district court on Musgrave's motion to dismiss the indictment, clearly constitutes a proceeding ancillary to the grand jury proceeding. Thus, the admission into evidence of Dunn's testimony during the hearing on Musgrave's motion was proper in that it constituted an affirmation and adoption of the Canges statement, supportive thereof and cumulative in nature.

Furthermore, the admission into evidence of Dunn's testimony given at the Musgrave hearing does not create a fatal variance between proof at trial and the indictment. This court has consistently held that a variance between the indictment and evidence is not fatal unless the defendant could not have anticipated from the indictment what evidence would be presented at trial or unless the conviction based on an indictment would not bar a subsequent prosecution. United States v. Cowley, 452 F.2d 243 (10th Cir. 1971); United States v. Freeman, 514 F.2d 1184 (10th Cir. 1975). Clearly, where Dunn's testimony in the Musgrave motion hearing was inextricably related to his Canges statement, that is, affirming the truth of the latter, it cannot be said that Dunn could not have anticipated that such evidence would be presented against him at his perjury trial.

Finally, the court has also considered whether the indictment brought against Dunn meets the standards for sufficiency of an indictment as set forth in United States v. Radetsky, 535 F.2d 556 (10th Cir. 1976). The government has repeatedly stated its reliance upon § 1623 (c) in this case. Therefore, to state an offense under that statute, the government had to allege inconsistent statements by Dunn made in one or more proceedings ancillary to a grand jury or court. In the indictment the government pleaded Dunn's grand jury testimony and Dunn's Canges statement, the latter of which we have determined is in and of itself not taken in a proceeding ancillary to the grand jury. While Dunn's testimony at the Musgrave hearing is clearly taken in a proceeding ancillary to the grand jury the government completely failed to plead such testimony in the indictment.

However, the sufficiency of an indictment is to be determined by practical rather than technical considerations, United States v. Crim, 527 F.2d 289 (10th Cir. 1976), cert. denied 425 U.S. 905. Viewed in this practical light, where excerpts from the Canges statement were necessarily included in the indictment to establish "inconsistency", and where the Canges statement was inextricably related to Dunn's testimony in the Musgrave

hearing which *was* taken in an ancillary proceeding, we hold that the indictment sufficiently states an offense under § 1623(c).

GRAND JURY TESTIMONY:

Having established by response to the bill of particulars that the government intended to prove a violation of § 1623(a) through the use of the method prescribed in § 1623(c), Dunn contends that immunized grand jury testimony may not be used to establish the *corpus delecti* of a prosecution for inconsistent declarations without a prior showing of its falsity.

Prior to his testimony before the grand jury, Dunn was granted immunity in accord with 18 U.S.C. § 6002 which provides:

> No testimony or other information compelled under the order may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

It is hornbook law that testimony given by a witness under a grant of immunity cannot be used to incriminate him in crimes or activities concerning which he gives testimony. Kastigar v. United States, 406 U.S. 441 (1972). However, the grant of immunity is never a license to commit perjury. In United States v. Tramunti, 500 F.2d 1334, 1344 (2nd Cir. 1974), cert. denied 419 U.S. 1079, the court stated:

> "The immunity granted by the court does not confer upon the witness the right to perjure himself or withhold testimony. . . . The very purpose of the granting of immunity is to reach the truth and when that testimony is incriminating, it cannot be used against him. If the witness thwarts the inquiry by evasion or falsehood, as the appellant did here, such conduct is not entitled to immunity. In fact, another crime not existing when the immunity was offered is thereby committed. The immunity does not extend *in futuro*."

Neither the Fifth Amendment nor statutory immunity offers a witness protection against prosecution for perjury, United States v. Frumento, 552 F.2d 534 (3rd Cir. 1977). In United States v. Mandujano, 425 U.S. 564, 576 (1976), Chief Justice Burger, speaking for the court, described the sanctions available to the government when an immunized witness commits perjury:

> "On the other hand, when granted immunity, a witness once again owes the obligation imposed upon all citizens—the duty to give testimony—since immunity substitutes for the privilege.
>
> "In this constitutional process of securing a witness' testimony, perjury simply has no place whatever. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative. The power of subpoena, broad as it is, and the power of contempt for refusing to answer, drastic as that is—and even the solemnity of the oath—cannot insure truthful answers. Hence, Congress has made the giving of false answers a criminal act punishable by several penalties; in no other way can criminal conduct be flushed into the open where the law can deal with it."

§ 1623 is a species of perjury. Its enactment was intended to facilitate perjury prosecutions and establish a new false declaration provision applicable to federal grand jury and court proceedings. United States v. Gross, 511 F.2d 910 (3rd Cir. 1975), cert. denied 423 U.S. 924; Organized Crime Control Act, Title IV, 1970 U.S. Code Cong. and Ad. News at 4007, 8.

We feel that Congress intended to include § 1623 false declarations prosecutions within the perjury exceptions to the immunity grant of § 6002. But see United States v. Berardelli, 565 F.2d 24, 29 (2nd Cir. 1977). Such interpretation is in the spirit of the perjury statutes, to insure against wrongs to the court and to meet the ends of justice. Bronston v. United States, 409 U.S. 352 (1973). We observe that it would be an affront to the basic purpose of the criminal justice system to permit one to avoid likely prosecution under the grant of immunity. The import of statements made in the context of a grand jury proceeding were recognized by the Supreme Court in United States v. Harris, 311 U.S. 292 (1940):

> Section 125 of the Criminal Code makes no distinction between the false assertions of the fact of prior statements and the false assertions of any other fact. Nor can we see any reason to make one. As the Government points out, the denial of the fact that certain statements have been made may be equally as clear, deliberate, and material a falsehood as the denial of any other fact. *And since statements made to government agents are generally one of the bases upon which criminal proceedings are instituted and indictments returned, such a distinction might substantially impede effective administration of criminal law.* (Emphasis supplied.)
> 311 U.S., at p. 295.

We have carefully studied the cases relied upon by Dunn, including United States v. Patrick, 542 F.2d 381 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); United States v. Housand, 550 F.2d 818 (2nd Cir. 1977), *cert. denied*, 431 U.S. 970 (1977); and United States v. Berardelli, *supra*. These cases involve the interrelationship between § 6002 immunity, the Fifth Amendment, and § 1623(c) inconsistent declarations prosecutions. Arising in different factual contexts, these decisions basically stand for the general proposition that immunized testimony may not be used to establish the *corpus delecti* of an inconsistent declarations prosecution without a prior showing of falsity.

However, unlike the fact situations of the above decisions relied upon by Dunn, Dunn's subsequent testimony in his Canges affidavit and in the Musgrave motion hearing not only were inconsistent with his immunized grand jury testimony, but, significantly, *contained Dunn's admission that he had in fact testified falsely before the grand jury.* Even though we have held that the government need not prove which of Dunn's statements were false for purposes of sustaining his conviction under § 1623(a), (c), and while we do not decide whether,

under other circumstances, immunized testimony may be admitted to demonstrate inconsistency without a prior showing of falsity, in our view Dunn's unequivocal admission that his immunized testimony before the grand jury was false justified the use of such immunized testimony to establish the *corpus delecti* of the present prosecution.

Immunity statutes are, of course, ordinarily for the benefit of the government, designed to effectively serve the compelling needs of the criminal justice system by preventing a substantial avoidance of prosecution and penalty. Dunn has grossly abused those purposes. In Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963), the Supreme Court said, *inter alia*:

> . . . *Plainly the offer of immunity contained in the voluntary disclosure policy presupposed, at the very least, that a delinquent taxpayer would make a "clean breast of things"* . . . . [in] deciding whether to disclose or run the risk of prosecution petitioners were initially justified in relying on the Treasury's general offer of immunity . . . *once a fraudulent disclosure had been determined upon they must be deemed to have recognized that such an offer had in effect been withdrawn as to them or, amounting to the same thing, that they were no longer entitled to place reliance on it.* Petitioners are thus in legal effect left in no better position than they would have been had the treasury formally withdrawn its offer of immunity before their disclosure figures were furnished. (Emphasis supplied.)
> 371 U.S., at pp. 349, 350.

In the instant case, Dunn's recantation was, in an analogy to *Shotwell, supra*, an admission that he had not made a "clean breast of things" in his immunized testimony before the grand jury which implicated Musgrave. Thus, such false testimony stripped him of the cloak of immunity which he was initially entitled to rely upon. Dunn's recantation thus—as in *Shotwell*—in legal effect left him in no better position than he would have been in had the Government formally withdrawn its offer of immunity before he testified before the grand jury.

WE AFFIRM.

IN THE UNITED STATES TENTH CIRCUIT
COURT OF APPEALS
MAY TERM—June 22, 1978

Before The Honorable James E. Barrett, The Honorable William E. Doyle, and The Honorable James K. Logan, Circuit Judges

No. 77-1398

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

ROBERT DUNN, DEFENDANT-APPELLANT

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

SUPREME COURT OF THE UNITED STATES

No. 77-6949

ROBERT DUNN, PETITIONER

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Tenth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 11, 1978

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 284133 255

Supreme Court, U. S.
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No. 77-6949

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

ROBERT DUNN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D. C. 20530

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-6949

ROBERT DUNN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

QUESTION PRESENTED

Whether a witness who has testified before a grand jury under a grant of immunity and subsequently gives contradictory non-immunized testimony in a judicial proceeding may have his immunized testimony used against him in a false declarations prosecution based on the inconsistent statements theory of 18 U.S.C. 1623(c).

STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioner was convicted on three counts of making false declarations, in violation of 18 U.S.C. 1623. 1/ He was sentenced to concurrent five-year terms of imprisonment. The court of appeals affirmed (Pet. App. 1-12).

1/ Petitioner was acquitted on two other counts.

1. The evidence adduced at trial shows that on June 16, 1976, petitioner testified under a grant of immunity (see 18 U.S.C. 6002) before a federal grand jury investigating illegal drug activity at the Colorado State Penitentiary. Petitioner testified that Phillip Musgrave gave him drugs in the penitentiary (I R. 99-100),[2] that petitioner made telephone calls at the behest of Musgrave to a Kate Blehm during which code words for drugs were used (I R. 117-118), and that in February 1976 Musgrave gave him a list of chemicals that he wanted (I R. 150). Following this testimony, the grand jury indicted Musgrave on charges of conspiring to manufacture and distribute controlled substances.

Approximately three months later, on September 30, 1976, petitioner went to the office of Michael Canges, Musgrave's attorney, and gave a statement under oath recanting his grand jury testimony implicating Musgrave (I R. 74, 77-79). Musgrave's attorney filed a transcript of petitioner's statement in the district court where Musgrave's prosecution was pending and moved to dismiss the indictment because it was based upon petitioner's allegedly perjured testimony.

Thereafter, at an evidentiary hearing in the district court on Musgrave's motion, petitioner adopted the statement he had given at Canges' office and testified that "[p]ossibly ten percent" of his grand jury testimony was truthful (Pet. 9).[3] This testimony was volunteered by petitioner, who had received no grant of immunity with respect thereto.

2/ "R." refers to the record in the court of appeals.

3/ As a result of petitioner's sworn deposition and his testimony at the evidentiary hearing, the government negotiated a plea with Musgrave wherein he pleaded guilty to possession of methamphetamine in violation of 21 U.S.C. 844, a misdemeanor (Tr. 76-77).

Petitioner was then indicted for knowingly making a false material declaration in violation of 18 U.S.C. 1623. The indictment charged, under the theory of prosecution authorized by subsection (c) of Section 1623, that various statements made during petitioner's grand jury testimony were inconsistent with statements made under oath to Musgrave's attorney and adopted at the subsequent court hearing "to the degree that one of them is necessarily false * * *." At trial, the government introduced the relevant portions of petitioner's grand jury testimony, his sworn statement to Musgrave's attorney, and his testimony at the evidentiary hearing. (Pet. App. 2-3).

2. On appeal, petitioner contended that the sworn recantation given in the attorney's office could not form the basis for a false declaration prosecution under 18 U.S.C. 1623 and that, in any event, the prosecution could not use petitioner's immunized grand jury testimony in a prosecution under Section 1623 based upon an inconsistent statements theory.

As to the first contention, the court of appeals agreed with petitioner that the taking of the sworn recantation in attorney Canges' office did not constitute a "proceeding before or ancillary to any court or grand jury" within the meaning of Section 1623 (Pet. App. 5-6). Nevertheless, the court held that the evidence of petitioner's subsequent affirmation of the recantation during the hearing on Musgrave's motion to dismiss could sustain the prosecution under Section 1623. While the indictment referred to the Canges statement rather than the subsequent in-court testimony, the court of appeals concluded that this variance

between the indictment and the proof at trial was not fatal because petitioner could have anticipated that the evidence of his testimony would be presented against him at trial (Pet. App. 7-8).[4/]

Turning to the question whether petitioner's immunized grand jury testimony was properly used against him at trial, the court of appeals held that, while truthful testimony given under immunity cannot be used to incriminate the witness for crimes concerning which he testifies, perjured testimony is not protected by the immunity and may be used to establish perjury or false declarations (Pet. App. 8-9; see United States v. Mandujano, 425 U.S. 564 (1976)). The court also accepted the "general proposition that immunized testimony may not be used to establish the corpus delicti of an inconsistent declarations prosecution without a prior showing of falsity" (Pet. App. 10). The court found, however, that petitioner's "subsequent testimony in his Canges affidavit and in the Musgrave motion hearing not only [was] inconsistent with his immunized grand jury testimony, but, significantly, contained [petitioner's] admission that he had in fact testified falsely before the grand jury" (Pet. App. 11; emphasis in original).

The court concluded that petitioner's "unequivocal admission that his immunized testimony before the grand jury was false

4/ The second question presented by the petition (Pet. 2) involves the issue whether the Canges statement could properly form the basis of a prosecution under Section 1623. Since this issue was resolved in petitioner's favor by the court of appeals, there is no occasion for this Court to review it. Petitioner does not otherwise attack the validity of the indictment, and the court of appeals' decision sustaining the indictment presents no issue of sufficient importance to require consideration by this Court.

justified the use of such immunized testimony to establish the corpus delicti of the present prosecution." Ibid. The court reasoned that petitioner had "grossly abused" the grant of immunity (ibid.) and that his recantation "in legal effect left him in no better position than he would have been in had the Government formally withdrawn its offer of immunity before he testified before the grand jury" (Pet. App. 12, citing Shotwell Manufacturing Co. v. United States, 371 U.S. 341, 349-350 (1963)).

DISCUSSION

In this case petitioner gave immunized testimony before the grand jury and subsequently gave inconsistent non-immunized testimony during the Musgrave hearing. He was thereafter indicted for making false material declarations, and the prosecution was maintained under the inconsistent statements rationale of 18 U.S.C. 1623(c). The question presented, as we view it, is whether either the Fifth Amendment privilege against compelled self-incrimination or the provisions of the use immunity statute, 18 U.S.C. 6002, bar the use of the inconsistent statements theory in this prosecution, on the ground that petitioner is protected from the use of truthful immunized testimony against him to prove the falsity of subsequent non-immunized testimony.

While we believe that the court of appeals reached the correct result in this case, we recognize that the issue presented is significant and that there are strong indications that three circuits would have reached a contrary result. Accordingly, we would ordinarily acquiesce in the grant of certiorari in this case.

However, because this Court has granted review in another case (New Jersey v. Portash, No. 77-1489, cert. granted June 12, 1978), the decision in which may be dispositive of the constitutional issue presented herein, we are recommending that this case be held pending further developments.

1. It is not disputed that petitioner testified under oath on two occasions so inconsistently that it may be concluded with assurance that he testified falsely on one or the other of those occasions. The issue here concerns the manner in which the prosecution may prove the offense that undoubtedly occurred. By utilizing the inconsistent statements approach permitted by Section 1623(c), the prosecution eschewed the burden of proving specifically that one or the other of the inconsistent statements was false. If the approach was validly employed here, the convictions could stand either on the theory that petitioner's grand jury testimony was false and his subsequent recantation of that testimony truthful, or on the theory that the grand jury testimony was truthful and the contradictory testimony at the Musgrave hearing false.

Preliminarily, we note that we do not agree with the rationale employed by the court of appeals to sustain use of the inconsistent statements theory in this case. Proceeding from the sound predicate that the immunity granted petitioner to override his claim of privilege protects only truthful testimony (see, e.g., United States v. Mandujano, 425 U.S. 564 (1976); United States v. Knox, 396 U.S. 77, 81-82 (1969)), the court considered petitioner's subsequent avowal that the grand jury testimony was false to be sufficient to deprive it of immunity from use by the prosecution (Pet. App. 11). We believe this approach would ordinarily be

appropriate in cases in which the prosecution seeks to use the immunized testimony only for its falsity. See United States v. Moss, 562 F. 2d 155 (2d Cir. 1977), cert. denied, 435 U.S. 914 (1978); cf. United States v. Kahan, 415 U.S. 239 (1974); United States v. Tramunti, 500 F. 2d 1334 (2d Cir.), cert. denied, 419 U.S. 1079 (1974). Here, however, the prosecution did not necessarily rest on the theory that petitioner's immunized grand jury testimony was false; it was equally likely that the conviction was based on the truthfulness of the grand jury testimony and the falsity of petitioner's subsequent sworn but non-immunized recantation. In view of the latter possibility, petitioner's statement that his grand jury testimony had been false does not in our view suffice to establish the proposition that it could be used against him even if truthful, a proposition that is essential to sustaining the validity of his conviction.

Although we disclaim reliance upon the rationale of the court of appeals, we nevertheless submit that it reached the correct result. Thus, while truthful immunized testimony may not be used in any way to prove any offense that the witness had committed at the time he invoked the privilege against compelled self-incrimination and was required to testify, the protection does not necessarily extend to use of the testimony to prove a subsequent offense, particularly the subsequent offense of perjury. As the Court observed in United States v. Freed, 401 U.S. 601, 606-607 (1971), there exists no "periphery of the Self-Incrimination Clause which protects a person against incrimination not only against

past or present transgressions but which supplies insulation for a career of crime about to be launched." See also id. at 610-612 (Brennan, J., concurring); United States v. Bryan, 339 U.S. 323, 340-341 (1950); Glickstein v. United States, 222 U.S. 139, 142 (1911). 5/

We submit that the extent of the constitutional immunity conferred upon a witness who is compelled to testify is properly measured by the scope of the privilege enjoyed by the witness at the time he declines to testify on Fifth Amendment grounds. Thus, in the instant case, petitioner was privileged to decline to testify with regard to drug dealings at the prison, as to which he appears to have had some potential culpability. The grant of immunity under which his grand jury testimony was compelled precludes use of his testimony or its fruits to convict him of the substantive offenses about which he testified, and the government has made no attempt to utilize his immunized testimony for such a purpose.

On the other hand, had petitioner invoked his privilege solely on the ground that he might in some subsequent proceeding elect to give materially inconsistent testimony, and he did not wish to create evidence now that could be employed to establish the falsity of such hypothetical future testimony, we see little basis for serious argument that such a claim of privilege would be sustainable.

5/ Marchetti v. United States, 390 U.S. 39, 53-54 (1968), rejects an absolute past-future distinction for purposes of evaluating the scope of the privilege that may legitimately be claimed under the Fifth Amendment. How Marchetti's conclusion is to be squared with Freed is uncertain, but in any event we do not read Marchetti as holding that any possibility of incrimination respecting future offenses will support invocation of the privilege. At most, it suggests that the general principle of distinguishing between past and future offenses may be subject to a fairly narrow exception in cases in which the potential for incrimination is substantial, non-speculative, and relatively immediate.

Since the privilege could not properly have been invoked on this basis, we believe that the constitutional immunity acquired when petitioner was compelled to testify did not embrace this possible incriminating use of his testimony. 6/ If we are correct, it follows that there is no constitutional barrier to the use in this case of petitioner's immunized grand jury testimony, even if that testimony was truthful, to establish the falsity of his subsequent inconsistent testimony at the Musgrave hearing. 7/

The soundness of this proposition is illustrated by considering what the effect would have been of a grant of transactional immunity to petitioner at the time of his grand jury testimony. Such immunity, which we assume would have sufficed to satisfy his rights under the Fifth Amendment privilege, would presumably not have protected him from prosecution for a subsequent perjury in testifying about the substantive offenses for which he has been immunized. If that is correct, then there seems little basis for concluding that the use of immunity granted in this case conferred constitutional protection against use of petitioner's testimony to establish a subsequent perjury.

6/ We acknowledge that this analysis may be inconsistent with the approach taken by the Court in Cameron v. United States, 231 U.S. 710, 721 (1914), in considering a repealed provision of the Bankruptcy Act of 1898. We believe that the statutory ruling in Cameron should not be deemed controlling of the constitutional question presented here, especially in light of its tension with later decisions of this Court on the scope of the privilege against compelled self-incrimination.

7/ Even if there is no constitutional obstacle to the use of immunized testimony to prove a crime committed subsequent to the giving of the testimony, the language of the last clause of 18 U.S.C. 6002 could be read to preclude such use. At least one court, however, has concluded that the language should not be read literally to bar all uses other than those specified by the statute. United States v. Tramunti, supra, 500 F. 2d at 1345; see also Korman, The Use of Testimony Compelled Under a Grant of Use Immunity, 44 Brooklyn L. Rev. 935, 936 (1978). While this statutory issue presumably will require consideration in the event review of the decision in this case is granted, we do not believe that the statutory question independently warrants review if the constitutional issue is resolved in Portash.

2. The view we advance here -- that even truthful immunized testimony is not necessarily entirely immune from use in any criminal prosecution of the witness -- is contrary to strongly worded dicta in several court of appeals opinions that indicate that the courts in question would not have upheld petitioner's convictions. This divergence of views and of probable results further supports review of the instant case by this Court, unless the issue is disposed of in the interim by the decision in New Jersey v. Portash (see point 3, infra).

In United States v. Berardelli, 565 F. 2d 24 (2d Cir. 1977), and United States v. Patrick, 542 F. 2d 381 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977), the courts were presented with appeals by witnesses who had been held in contempt for refusing, despite a grant of immunity, to give testimony on the ground that their testimony, if inconsistent with prior testimony they had given, might be used to convict them of making false declarations under the inconsistent statements theory of Section 1623(c). In United States v. Housand, 550 F. 2d 818 (2d Cir.), cert. denied, 431 U.S. 970 (1977), a prospective defense witness who had earlier testified under a grant of immunity before the grand jury refused, in the absence of a new grant of immunity, to testify at trial; this refusal was upheld by the district court, and the defendant challenged the correctness of that ruling on appeal. The contempt convictions of Patrick and Berardelli were affirmed, while the claim of the appellant in Housand was rejected. Each opinion explicitly, albeit unnecessarily, stated that no incriminating use of any kind could be made of truthful immunized testimony, even to prove a later perjury. See also United States v. Apfelbaum, No. 77-2427 (3d Cir. August 10, 1978).

The results in Berardelli, Housand, and Patrick were plainly correct wholly without regard to their dicta and are not inconsistent with the result in the instant case. In each of those cases the witness, having previously testified, was called to testify on the same subject a second time. In each case he invoked his privilege on the ground that truthful testimony on the second occasion might tend to establish the falsity of his prior testimony, thereby incriminating him. Each invocation of the privilege was plainly proper and foreclosed the compulsion of testimony without a grant of immunity. In each instance, moreover, the grant of immunity would have precluded use of the testimony at the second appearance to establish the falsity of the prior testimony, whether pursuant to an inconsistent statements theory or otherwise. Since this is so, there was absolutely no necessity for the courts to express any view about the use that might be made of any immunized testimony, truthful or otherwise, given during an earlier appearance.

In the instant case, by contrast, petitioner's second, inconsistent testimony, was volunteered by him. He could have invoked his privilege to refuse to give that testimony without a grant of immunity, but he did not do so. Accordingly, there was here no potential for use of compelled, immunized testimony against petitioner to incriminate him with respect to prior unlawful conduct. Nevertheless, while this case is distinguishable, we believe that the unqualified nature of the dicta in cases from three other circuits is sufficient to justify consideration of the validity of petitioner's conviction by this Court.

3. We do not suggest an immediate grant of certiorari in this case, however, because the constitutional issue it presents may be effectively resolved by this Court's decision in New Jersey v. Portash, supra, in which review has already been granted and

which is set for argument within the next few weeks. In Portash the defendant gave grand jury testimony under a grant of use immunity and was thereafter indicted for offenses that had been the subject of his testimony. The trial court ruled that, should Portash elect to testify and should his testimony be inconsistent with his immunized grand jury testimony, the prosecution would be permitted to use his grand jury testimony to impeach his trial testimony. Since the premise of such impeachment use would necessarily be that the immunized grand jury testimony was truthful and demonstrated the falsity of his subsequent inconsistent testimony, the case is analytically parallel to the instant case, where the crucial issue is the propriety of using petitioner's immunized grand jury testimony against him on the hypothesis that it was truthful and that it showed the falsity of his later testimony.

Accordingly, if the State prevails in Portash, the correctness of the affirmance of petitioner's conviction would be demonstrated, and there would be no need for this Court to grant review of that conviction. If the State's position is rejected by this Court, however, it would not necessarily follow that petitioner's conviction is infirm. There is a material difference in the cases in this regard: in Portash, the immunized testimony would be employed to help the State establish the defendant's guilt of the same crime regarding which his claim of privilege was overridden by the immunity grant; in the instant case, by contrast, it is being used to prove a crime that had not occurred at the time petitioner was granted immunity and as to which he then had no testimonial privilege. Consequently, we think it likely that review of this case would be in order if the decision in Portash is affirmed.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in New Jersey v. Portash. If Portash is reversed, certiorari should be denied in this case. If Portash is affirmed, certiorari should be granted in this case.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

NOVEMBER 1978

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No. 77-6949

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

ROBERT DUNN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

REPLY TO THE MEMORANDUM FOR THE UNITED STATES

DANIEL J. SEARS
Federal Public Defender
District of Colorado
Denver, Colorado 80294

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-6949

ROBERT DUNN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY TO THE MEMORANDUM FOR THE UNITED STATES

COMES NOW the Petitioner, Robert Dunn, by and through his court appointed counsel, Federal Public Defender Daniel J. Sears, and pursuant to Rule 24(4) of the Supreme Court Rules, hereby replies to the Memorandum for the United States as follows:

1. Counsel for the Respondent has erred in his assessment of the "Question Presented" in his Memorandum for the United States in that Petitioner did not subsequently give "contradictory non-immunized testimony in a judicial proceeding" as alleged. See page 1, Memorandum for the United States. This statement assumes several incorrect conclusions which are not supported by the record. As alleged in the Indictment, the defendant testified at a June 16, 1976, session of the Federal Grand Jury sitting at Denver, Colorado. Dunn initially claimed his Fifth Amendment privilege against self-incrimination, was taken before a Federal District Judge and upon application of the United States, was ordered to testify truthfully before the Federal Grand Jury under an order of use immunity pursuant to Title 18 United States Code, Section 6002. Dunn reappeared before the Grand Jury and testified that Musgrave had given him drugs in the penitentiary, that he had made telephone calls to Kate Blehm during which code words for drugs were used, and that Musgrave had given him a list of chemicals that he (Musgrave) wanted. On September 30, 1976, in Musgrave's attorney's office, Dunn recanted his Grand Jury testimony and made statements concededly inconsistent with his earlier Grand Jury testimony. On appeal, the appellant argued, and the Tenth Circuit Court of Appeals ruled, that the proceedings in the private attorney's office were not ancillary to a U. S. Court or Grand Jury proceeding as required by 18 U.S.C. §1623. The June 16th appearance before the Federal Grand Jury and the September 30th appearance in the attorney's office were the only two proceedings alluded to in the Indictment. (See Indictment attached hereto.) The declarations made during these two sessions were the only declarations alleged to be inconsistent under Section 1623(c). A judicial proceeding did take place on October 21, 1976, concerning an evidentiary hearing on a motion to dismiss the Indictment in United States vs. Musgrave, Criminal Case No. 76-CR-155. Statements in this proceeding, however, were not incorporated

into the Indictment and alleged to be inconsistent with declarations earlier made. Furthermore, Dunn's statements at the hearing cannot be characterized as inconsistent with his earlier Grand Jury testimony. He merely stated that "[p]ossibly ten percent" of his Grand Jury testimony was truthful. Such a statement cannot be deemed to be inconsistant with earlier testimony concerning Musgrave's giving him drugs in the penitentiary, his making phone calls to Kate Blehm during which code words for drugs were discussed, and Musgrave's giving him a list of chemicals. The only possible use of such a statement that his Grand Jury testimony was largely false would be under Rule 801 of the Federal Rules of Evidence, but only if the government had attempted to prove that Dunn's June Grand Jury testimony was false. The government attorney, however, specifically declined to proceed on such a theory and the Court never submitted it to the jury for its consideration. The sole theory presented throughout the trial was one of inconsistent declarations under Section 1623(c) based on the June 16th Grand Jury appearance and the September 30th statements in the attorney's office. The conviction under §1623(c) cannot be sustained.

2. As abhorrent as Dunn's conduct may have been, the Tenth Circuit erred in sustaining his conviction on the basis of declarations not charged in the Indictment. As argued above, the declarations made at the October 21st evidentiary hearing do not qualify as inconsistent declarations. Notwithstanding, the trial court and the appellate court

attempted to assist the government in "bootstrapping" the September 30th proceeding in the attorney's office into one ancillary to a U. S. Court or Federal Grand Jury proceeding. 18 U.S.C. §1623 provides for a violation where "the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false . . ." The inconsistent declarations all must be made in proceedings before or ancillary to any court or Grand Jury of the United States. Though the government alleged in paragraph 5 of each respective Count that the September 30, 1976, proceeding was ancillary to United States vs. Musgrave, et al., Criminal Case No. 76-CR-155, the Tenth Circuit sustained Petitioner's argument that it did not qualify as such. The trial court and the appellate court, however, looked outside the Indictment to the evidentiary hearing in U. S. District Court to sustain the conviction under Section 1623(c). This action tended to amend the Indictment in violation of the holding in Stirone v. United States, 361 U.S. 212 (1960). Though the Tenth Circuit opined that the defendant should have contemplated the admission of such statements, the defendant was not confronting the mere introduction of unexpected evidence, he was asked to confront charges not alleged in the Indictment. The record is replete with the government's repeated representations from bill of particulars through closing arguments that it was proceeding on the declarations alleged to be inconsistent between the June 16th and September 30th proceedings. Yet the Tenth Circuit Court of Appeals found it

appropriate to sustain the conviction on the basis of what it deemed to be inconsistent declarations at the proceeding in U. S. District Court not mentioned in the Indictment. Respondent follows the same line of reasoning in page 3, Memorandum for United States, where he alleged "[t]he indictment charged, under the theory of prosecution authorized by subsection (c) of Section 1623, that various statements made during petitioner's grand jury testimony were inconsistent with statements made under oath to Musgrave's attorney and adopted at the subsequent court hearing 'to the degree that one of them is necessarily false * * *'". (Emphasis added.) If Dunn had gone through each of his declarations before the Grand Jury and testified inconsistently at the subsequent court hearing to each one, an inconsistent declarations prosecution might withstand attack. But his mere statement in a judicial proceeding that his earlier Grand Jury testimony was largely false implying that his subsequent inconsistent statements in a non-judicial proceeding were largely true, cannot justify a conviction under Section 1623(c).

3. Respondent at page 11, Memorandum for the United States, concedes the correctness of the results in Berardelli, Housand and Patrick, on the one hand, yet contends that they are not inconsistent with the result in the instant case. At the same time, however, he seems to indicate that the courts in each of those respective cases "would not have upheld petitioner's convictions". See page 10, Memorandum for the United States. The facts in the present case are

distinguishable from Patrick, Housand and Berardelli, but the principle that testimony compelled under an order of immunity may not be used to establish the corpus delicti in an inconsistent declarations prosecution under Section 1623(c) is as applicable to Dunn as it was to the defendants in each of those cases. The order granting Dunn immunity prior to his testimony before the Federal Grand Jury is absolute until and unless the government can bring him within an exception to 18 U.S.C. Section 6002. His testimony compelled under an order of immunity cannot be used against him except in a "prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." 18 U.S.C. Section 6002. An inconsistent declarations prosecution under Section 1623(c) does not fall within the exception unless the government is able to establish that the immunized witness violated the order by testifying falsely or refusing to testify. The phrase "otherwise failing to comply with the order" in Section 6002 must be read in conjunction with the prior words "perjury" and "false statement." Under the doctrine of noscitur a sociis, "otherwise failing to comply with the order" suggests that the order must be violated as a prerequisite to using the testimony in a perjury or false statement case. Unless it could have been shown that Dunn violated the order and testified falsely, his immunized testimony should not have been used against him. Contrary to Respondent's contentions, this rule must remain absolute regardless of whether the witness subsequently testifies voluntarily or under compulsion.

4. Petitioner respectfully requests that certiorari be granted and that his case be considered separately from the pending action in New Jersey vs. Portash. Though the two cases may contain similar issues, it appears that Petitioner's case is distinguishable. First of all, Dunn's case concerns the Court's expansion of the four corners of the Indictment. Secondly, it appears that the Portash case does not deal with the direct issue of whether immunized testimony can be used to establish the corpus delicti in an inconsistent declarations prosecution under Section 1623(c). Third, the record in Dunn contains corroborative evidence independent of his recantations that his forced immunized testimony was, in fact, truthful.

In Patrick, the defendant refused to testify on a claim of Fifth Amendment privilege despite immunization under 18 U.S.C. §6002. Patrick was convicted of civil contempt on the basis that his claim of privilege was not valid. The trial court ruled, and the appellate court affirmed, that Patrick's immunized testimony could not be used to establish the corpus delicti in an inconsistent declarations prosecution under 18 U.S.C. §1623(c). Certiorari was denied in the case. Dunn now has fully realized the fears expressed by Patrick. The integrity and confidence in ordered immunity and compelled testimony may not remain intact if this conviction is allowed to stand. The reasoning in Patrick, Housand, Berardelli, and Apfelbaum cannot be reconciled with the Tenth Circuit decision in Dunn.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Honorable Court not hold this matter in abeyance and grant certiorari for review of the conviction below.

Respectfully submitted,

DANIEL J. SEARS
Federal Public Defender

CERTIFICATE OF SERVICE

I certify that I personally delivered and/or placed in the United States Mails copies of the REPLY TO THE MEMORANDUM FOR THE UNITED STATES addressed as follows, on the 21st day of November, 1978.

Office of the Solicitor General
Department of Justice
Washington, D. C. 20530

Joseph F. Dolan, Esq.
United States Attorney
District of Colorado
330 U. S. Courthouse
1929 Stout Street
Denver, Colorado 80294

M. Scarborough

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

United States of America,

Plaintiff,

v.

ROBERT DUNN,

Defendant.

76-CR-322

CRIMINAL CASE NO. _____

INDICTMENT

18 USC §1623

COUNT I

The Grand Jury charges that:

1. On June 16, 1976, at Denver in the District of Colorado, ROBERT DUNN, while under oath as a witness in a proceeding before a Grand Jury of the United States in the District of Colorado, did knowingly make a false material declaration, as more fully set forth in paragraphs 2 through 6 of this Count I, in violation of Title 18, United States Code, Section 1623.

2. At the time and place aforesaid, the Grand Jury was conducting an investigation to determine whether there were violations of the federal conspiracy and drug abuse prevention and control statutes.

3. It was a matter material to this investigation to determine whether ROBERT DUNN had ever assisted Phillip Musgrave in smuggling controlled substances into the Colorado State Penitentiary through Steve and Debbie Strammel.

4. At the time and place aforesaid, ROBERT DUNN, while under oath, did knowingl declare before the Grand Jury with respect to the aforesaid material matter as follows:

Q. Did you assist him (Phillip Musgrave) in getting stuff smuggled into the penitentiary?

A. Yes, sir, once.

Q. Was that with the Strammels?

A. Yes, sir.

5. At a time subsequent to ROBERT DUNN'S declaration as aforesaid, that is, on September 30, 1976, while under oath as a witness in a proceeding ancillary to United States v. Musgrave, et al., Criminal Case No. 76-CR-155, ROBERT DUNN did knowingly declare with respect to the aforesaid material matter as follows:

Q. What about Steve Stramel. Did you ever know Steve Stramel?

A. Uh not knowing, by being introduced to him. I seen him at one time.

Q. Where did you see him?

A. Uh him and a girl Debra, Debbie uh came up to see Phillip and I seen him across the visiting room. I was visiting with some friends of mine that came up from Denver and I just seen him from a distance. I. . .I couldn't even. . .I doubt if I could recognize him.

Q. You never had any conversation with either Steve. . .

A. No sir.

Q. . . .or his girlfriend or wife, Debbie?

A. No.

Q. Did you ever smuggle in drugs to the institution from Steve and Debbie?

A. No sir.

6. The aforesaid declarations by ROBERT DUNN, as set forth in paragraphs four (4) and five (5) of this Count I were inconsistent to the degree that one of said declarations was false and known by him to be false when made.

COUNT II

The Grand Jury further charges that:

1. On June 16, 1976, at Denver in the District of Colorado, ROBERT DUNN, while under oath as a witness in a proceeding before a Grand Jury of the United States in the District of Colorado, did knowingly make a false material declaration, as more fully set forth in paragraphs 2 through 6 of this Count II, in violation of Title 18, United States Code, Section 1623.

2. At the time and place aforesaid, the Grand Jury was conducting an investigation to determine whether there were violations of the federal conspiracy and drug abuse prevention and control statutes.

3. It was a matter material to this investigation to determine whether Phillip Musgrave ever gave ROBERT DUNN a controlled substance while both were incarcerated in the Colorado State Penitentiary.

4. At the time and place aforesaid, ROBERT DUNN, while under oath, did knowingly declare before the Grand Jury with respect to the aforesaid material matter as follows:

Q. Did he (Phillip Musgrave) have drugs there in the penitentiary?

A. All the time.

Q. Did you work with him or for him in the penitentiary?

A. I was a gopher boy; I went for pop, commensary and held his stash for him.

Q. What did you get in return?

A. A fair amount of speed every time he'd cop.

Q. Every time he had some, he'd give you some?

A. Oh, yes, sir. I don't know whether it was because he liked me, because he wanted to do it, or because he was paranoid if he didn't do it, something bad would happen at first.

5. At a time subsequent to ROBERT DUNN'S declaration as aforesaid, that is, on September 30, 1976, while under oath as a witness in a proceeding ancillary to United States v. Musgrave, et al., Criminal Case No. 76-CR-155, ROBERT DUNN did knowingly declare with respect to the aforesaid material matter as follows:

Q. During the time that you were in the penitentiary uh did Phillip Musgrave ever give you any drugs of any sort?

A. No sir, he didn't.

6. The aforesaid declarations by ROBERT DUNN, as set forth in paragraphs four (4) and five (5) of this Count II were inconsistent to the degree that one of said declarations was false and known by him to be false when made.

COUNT III

The Grand Jury further charges that:

1. On June 16, 1976, at Denver in the District of Colorado, ROBERT DUNN, while under oath as a witness in a proceeding before a Grand Jury of the United States in the District of Colorado, did knowingly make a false material declaration, as more fully set forth in paragraphs 2 through 6 of this Count III in violation of Title 18, United States Code, Section 1623.

2. At the time and place aforesaid, the Grand Jury was conducting an investigation to determine whether there were violations of the federal conspiracy and drug abuse prevention and control statutes.

3. It was a matter material to this investigation to determine whether ROBERT DUNN made telephone calls to Kate Blehm regarding drugs from the Colorado State Penitentiary.

4. At the time and place aforesaid, ROBERT DUNN, while under oath, did knowingly declare before the Grand Jury with respect to the aforesaid material matter as follows:

Q. Did you make some calls for Musgrave to Kate?

A. Yes, sir, I did.

Q. Did he give you the phone number?

A. Yes, sir, both of them.

Q. He gave two phone numbers?

A. One where she worked at the--881-2273, at the Rustic Resort and at home, 881-2278, and that's in Belleview. I may have them numbers mixed up, but I'm not sure. It's been quite a while since I called the number.

Q. So you would call and give messages to Kate also in addition to Musgrave?

A. Yes.

Q. Did you have any code names you were supposed to use?

A. He was one, Jimmy Heath was two and I was three.

Q. Did you talk about speed or did you use another word?

A. Bull shit, excuse me.

Q. That was the code name for the speed?

A. Yes, sir.

5. At a time subsequent to ROBERT DUNN'S declaration as aforesaid, that is, on September 30, 1976 while under oath as a witness in a proceeding ancillary to United States v. Musgrave, et al., Criminal Case No. 76-CR-155, ROBERT DUNN did knowingly declare with respect to the aforesaid material matter as follows:

Q. Now who is Kate?

A. Kate Blehm.

Q. And who was she?

A. Phil's uh girl.

Q. Alright.

A. Uh he asked me if I would call her and ask. . .and have her bring up a book, you know, like a tarot card book that uh shows you how to read 'em and how to uh understand 'em. And uh to be sure and come up and see him. Uh that was it.

Q. Was there any mention or any code with reference to drugs in any conversation with Kate Blehm?

A. No sir.

Q. Did Phillip tell you what to say to her insofar as code which might involve speed or the smuggling of drugs into the institution?

A. No sir. All he said was see. . .tell her to get me uh a tarot card book and to be sure and come up and see him.

6. The aforesaid declarations by ROBERT DUNN, as set forth in paragraphs four (4) and five(5) of this Count III were inconsistent to the degree that one of said declarations was false and known by him to be false when made.

COUNT IV

The Grand Jury further charges that:

1. On June 16, 1976, at Denver in the District of Colorado, ROBERT DUNN, while under oath as a witness in a proceeding before a Grand Jury of the United States in the District of Colorado, did knowingly make a false material declaration, as more fully set forth in paragraphs 2 through 6 of this Count IV, in violation of Title 18, United States Code, Section 1623.

2. At the time and place aforesaid, the Grand Jury was conducting an investigation to determine whether there were violations of the federal conspiracy and drug abuse prevention and control statutes.

3. It was a matter material to this investigation to determine whether Phillip Musgrave ever gave ROBERT DUNN a list of chemicals useful in the manufacture of methamphetamine.

4. At the time and place aforesaid, ROBERT DUNN, while under oath, did knowingly declare before the Grand Jury with respect to the aforesaid material matter as follows:

Q. During February of '76, did you see Musgrave again and find out--did he say that he still wanted any of those chemicals?

A. Yes. I was living out on West 58th Avenue in Arvada, 14500 West 58th. It was a 10-acre farm that me and a friend of mine was renting--me and a friend of mine and his wife, and it was pretty excluded, had a barn. And the guy that I was living with, he worked out at Continental Oil also and he came into town looking for me on a Monday and I had just had some teeth pulled and I didn't feel like messing with anybody so I just started spacing him out--just not meeting when I was supposed to, and he chased me for three and a half days until he finally caught up with me.

Q. What did he want when he caught up with you?

A. Propenyl, methylamine. He wrote out on an envelope--a big manilla envelope that I still have--all the chemicals that are needed.

Q. Musgrave wrote this out on the envelope?

A. Yes, sir.

5. At a time subsequent to ROBERT DUNN'S declaration as aforesaid, that is, on September 30, 1976 while under oath as a witness in a proceeding ancillary to United States v. Musgrave, et al., Criminal Case No. 76-CR-155, ROBERT DUNN did knowingly declare with respect to the aforesaid material matter as follows:

Q. Did you ever at any time ever get a list of chemicals from Mr. Musgrave for any purpose?

A. No sir.

6. The aforesaid declarations by ROBERT DUNN, as set forth in paragraphs four (4) and five(5) of this Count IV were inconsistent to the degree that one of said declarations was false and known by him to be false when made.

COUNT V

The Grand Jury further charges that:

1. On June 16, 1976, at Denver in the District of Colorado, ROBERT DUNN, while under oath as a witness in a proceeding before a Grand Jury of the United States in the District of Colorado, did knowingly make a false material declaration, as more fully set forth in paragraphs 2 through 6 of this Count V in violation of Title 18, United States Code, Section 1623.

2. At the time and place aforesaid, the Grand Jury was conducting an investigation to determine whether there were violations of the federal conspiracy and drug abuse prevention and control statutes.

3. It was a matter material to this investigation to determine whether Edward Perkins had ever delivered methamphetamine to ROBERT DUNN.

4. At the time and place aforesaid, ROBERT DUNN, while under oath, did knowingly declare before the Grand Jury with respect to the aforesaid material matter as follows:

Q. Did you have a meeting with Perkins some time?

A. He came down one night. Cebe sent me down a half ounce as a bonus for the girl I got him, that Kris.

Q. Was this in November or December of '75?

A. Yeah.

Q. Okay.

A. And Eddie Perkins come down and delivered it.

Q. Delivered it to you?

A. No, he come in kind of funny. He come in the front door of the apartment, said it was on the outside window sill of the bedroom and it was one of these--it was a basement where you couldn't roll the windows and they were roll-type windows and you couldn't roll them all the way out and I couldn't get my arm out there and Charlotte, my girl at the time, couldn't get her arm out there, so he stuck his arm out there and got it.

Q. And gave it to you?

A. Yes, sir, and then he did about six 180 degree turns and out the door.

5. At a time subsequent to ROBERT DUNN'S declaration as aforesaid, that is, on September 30, 1976, while under oath as a witness in a proceeding ancillary to United States v. Musgrave, et al., Criminal Case No. 76-CR-155, ROBERT DUNN did knowingly declare with respect to the aforesaid material matter as follows:

Q. You've met Eddie Perkins once or twice?

A. Uh twice.

Q. And how long did each of those meetings or uh social events take place?

A. With Mr. Perkins the first time, it was about three minutes. In other words, he came in and delivered a message you know, Phillip was in town and if I wanted to see and meet him for dinner. And the second time was at uh Aurora, a friend of mine's house. Went out to uh. . .I went out to sell a guy some tires and Eddie was there. Uh somethin' happened to his car. Oh, his wife or his ex-wife took his car and he didn't have any transportation. And he was waitin' for a ride and I. . .that was no more than hello and goodbye.

Q. Did you ever have any business dealings of any sort with Mr. Perkins?

A. No sir.

Q. Did you ever buy any speed from him?

A. No, but I'd sure like to sell him some.

Q. Did you sell him any?

A. No.

Q. Alright. Did you ever discuss speed with Mr. Perkins?

A. No sir.

6. The aforesaid declarations by ROBERT DUNN, as set forth in paragraphs four (4) and five (5) of this Count V were inconsistent to the degree that one of said declarations was false and known by him to be false when made.

A TRUE BILL:

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Foreman

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United States Attorney

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Assistant United States Attorney

Supreme Court, U. S.
FILED
JAN 25 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-6949

ROBERT DUNN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF FOR THE PETITIONER

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UNITED STATES OF AMERICA, *Respondent.*

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the United States Tenth Circuit Court of Appeals is reported officially at 577 F.2d 199. A copy of the opinion appears in the Appendix. (A. 70).

JURISDICTION

The judgment of the Court of Appeals affirming the conviction was entered June 5, 1978. (A. 70). A

timely Petition for Rehearing was denied on June 22, 1978. (A. 81). The Petition for Writ of Certiorari was filed on June 20, 1978. On June 28, 1978, the Court of Appeals granted a Motion to Stay Mandate pending final disposition by this Court. Certiorari was granted December 11, 1978. (A. 82).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V—Capital Crimes: Double Jeopardy: Self-Incrimination: Due Process: Just Compensation For Property

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

84 Stat. 927; Title 18, United States Code, § 6002. Immunity generally

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

84 Stat. 932; Title 18, United States Code, § 1623. False declarations before grand jury or court

> (a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of Title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time

the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

QUESTIONS PRESENTED

1. Whether an inconsistent declarations conviction can be sustained when one of the two declarations charged was not made in an "ancillary proceeding" within the meaning of the statute.

2. Whether the appellate court improperly amended the indictment by considering declarations not pled and by adopting a theory not presented at trial.

3. Whether immunized grand jury testimony can be used to establish the *corpus delicti* in an inconsistent declarations prosecution.

STATEMENT OF THE CASE

Dunn was indicted on five counts of false declarations before a U. S. court or grand jury in violation of 18 U.S.C. § 1623. (A. 3-11). Paragraph 1 of each count alleged that Dunn knowingly made false declarations before a federal grand jury on June 16, 1976. (A. 3-11). Paragraph 4 specified the particular grand jury declarations alleged to be inconsistent. Paragraph 5

of each count alleged that Dunn made certain declarations in a September 30, 1976, proceeding ancillary to *United States* v. *Musgrave*, (hereinafter referred to as the Canges affidavit). The last paragraph of each respective count alleged that the foregoing declarations were inconsistent to the degree that one of them was false. (A. 3-11). Due to the confusion created by the allegations in the indictment, the defendant moved for a bill of particulars to determine whether the government intended to prove that Dunn's grand jury declarations were knowingly false when uttered or whether it was relying on an inconsistent declarations theory under § 1623(c). (A. 12-13). Though the motion was denied, the government indicated its intent to rely on a § 1623(c) theory in proving its case. (A. 17-19). The government responded in part ". . . we do not need to prove at trial which of the declarations is false." (A. 18). Inconsistent declarations was the sole theory presented to the trial court and jury. (A. 65, 66-67).

At trial, Dunn objected to the admission of his grand jury declarations on the grounds that he was protected from their use by the immunity order entered prior to his testimony. (A. 48, 56). He also objected to the admission of the statements given in Canges' office because they were not made in a proceeding before or ancillary to a U.S. Court or grand jury. (A. 55-56, 75).

The government also introduced statements made by Dunn in an evidentiary hearing held October 21,

1976, in U.S. District Court on a motion to dismiss the Musgrave indictment. In it Dunn declared that only about ten percent of his grand jury testimony was true. (A. 43-46). The defense objected to the introduction of these additional statements on the grounds that they were not among the declarations charged in the indictment. (A. 55). The court admitted all three sets of declarations. (Government Exhibits 1-a, 2-a, and 4-a; A. 25, 33, 43, 56-57). [Note: Exhibits 1-a and 2-a are excerpts from the complete transcripts (Exhibits 1 and 2) prepared for presentation to the jury. R. Vol. I, 32, 60].

To support its claim that the immunized grand jury testimony could not be used against Dunn under an inconsistent declarations theory, the defense elicited testimony to demonstrate that Dunn had testified truthfully before the grand jury. The prosecutor handling the grand jury investigation testified that he was aware of independent evidence cooroborating the testimony and, but for Dunn's own recantations, no independent evidence was known refuting it. (A. 51). Assistant U. S. Attorney Snow was asked about each grand jury declaration alleged in the indictment and indicated that he was not aware of any independent evidence establishing its falsity. (A. 51-54).

At the close of the government's case the defendant moved for a judgment of acquittal on the grounds that Dunn's immunized grand jury testimony could not be used to establish the *corpus delicti* of an inconsistent declarations prosecution and that the state-

ments given in the private attorney's office (the Canges affidavit) were not made in proceedings before or ancillary to a U.S. court or grand jury as required by 18 U.S.C. § 1623. (A. 55-56). See Trial Brief (A. 63-67) and Motion for Judgment of Acquittal (A. 59-62). The defense renewed its objections to the introduction of the three exhibits (A. 56-57). The objections were overruled and the motion for judgment of acquittal was denied. (A. 1-2, 5-6).

The trial jury returned verdicts of guilty on three of the five counts. (A. 2). The U.S. Tenth Circuit Court of Appeals affirmed the convictions. (A. 70-80).

The appellate court found that "to state an offense under the statute, the government had to allege inconsistent statements by Dunn made in one or more proceedings ancillary to a grand jury or court." (A. 70). It agreed with Dunn that the Canges statements were not made in ancillary proceedings within the meaning of § 1623. (A. 75). It noted that the indictment pleaded Dunn's grand jury testimony and the Canges statement but completely failed to include his testimony at the Musgrave hearing. (A. 76). The court, however, sustained the conviction finding that Dunn had made inconsistent declarations at the Musgrave hearing, holding it to be an ancillary proceeding. (A. 75). The Court further ruled that Dunn's immunized grand jury testimony could be used to establish the *corpus delicti* in his inconsistent declarations prosecution because Dunn admitted he had lied to the grand jury in the Canges affidavit and in his testimony at the evidentiary hearing. (A. 79). Dunn's Petition for Rehearing was denied on June 22, 1978. (A. 81).

SUMMARY OF ARGUMENT

The Tenth Circuit properly ruled that one of the two alleged inconsistent declarations charged in each count of the indictment was not made in an "ancillary proceeding" within the meaning of 18 U.S.C. § 1623. (A. 75). Therefore, the statute was not violated and the conviction should not have been sustained.

The Tenth Circuit affirmed the conviction by considering declarations made in an ancillary proceeding (i.e. the Musgrave hearing) not charged in the indictment and by adopting a theory not presented at trial. (A. 75-76). The Court's ruling constituted both an amendment to and a prejudicial variance from the indictment. *Stirone* v. *United States*, 361 U.S. 212 (1960).

One of the alleged inconsistent declarations charged in each count of the indictment was taken from grand jury testimony given under a grant of immunity. Immunized testimony cannot be used against the witness in any criminal case unless it can be brought within one of the exceptions to the immunity statute. The grant of immunity is coextensive with the Fifth Amendment privilege. *Kastigar* v. *United States*, 406 U.S. 441 (1972). Several courts have correctly ruled that the statutory immunity and the constitutional privilege prohibit the use of im-

munized testimony to establish the *corpus delicti* of an inconsistent declarations prosecution. *United States* v. *Berardelli*, 565 F.2d 24 (2nd Cir. 1977); *United States* v. *Housand*, 550 F.2d 818 (2nd Cir. 1977) *cert. den.* 431 U.S. 970; *United States* v. *Patrick*, 542 F.2d 381 (7th Cir. 1976) *cert. den.* 430 U.S. 931. A witness cannot be stripped of his immunity under the perjury or false statements exception unless the government proves that the immunized testimony was false.

ARGUMENT I

Since The Canges Declarations Were Held Not To Have Been Made In An Ancillary Proceeding, Dunn's Inconsistent Declarations Conviction Cannot Stand.

The Tenth Circuit Court of Appeals ruled, in part, as follows:

> "This court has concluded that while the Canges statement is 'ancillary', in the sense that it is connected to and had an effect upon the grand jury proceeding, the event occurring in Canges' office, in and of itself, is not a 'proceeding' within the meaning of the statute so as to be a proceeding ancillary to a grand jury proceeding. Despite the administration of the oath and presence of the notary public, we hold that the event lacks the degree of formality the statute requires." (A. 75).

Having so ruled, the appellate court should have found that an essential element to sustain a conviction under § 1623 had not been established and that Dunn's conviction therefore could not stand. Instead, the court looked outside the indictment to the Musgrave evidentiary hearing to fulfill the requirement of an ancillary proceeding. (A. 75).

Title 18, United States Code, Section 1623(a) provides that any person who knowingly makes a false material declaration "in any proceeding before or ancillary to any court or grand jury of the United States" is guilty of a felony. Section 1623(c) states that the falsity of the declaration is sufficiently established if it is proven that the defendant while under oath "made irreconcilably contradictory declarations . . . in any proceeding before or ancillary to any court or grand jury." Having elected to proceed on an inconsistent declarations theory under § 1623(c), the government was obliged to prove that Dunn made irreconcilably inconsistent statements in one or more proceedings before or ancillary to a U.S. court or grand jury. The appellate court itself so stated.[1] (A. 76). Inconsistent declarations made in one ancillary proceeding and one nonancillary proceeding, however, cannot fulfill the jurisdictional requirement when the government proceeds under § 1623(c). The inconsistent statements in the nonancillary proceeding may provide extrinsic evidence of the falsity of the decla-

[1] The Court stated:

> "Therefore, to state an offense under that statute, the government had to allege inconsistent statements by Dunn made in one or more proceedings ancillary to a grand jury or court." (A. 76).

rations in the ancillary proceeding in a traditional perjury prosecution, but will not suffice under a § 1623(c) theory. See e.g., *United States* v. *Housand*, 550 F.2d 818, 823 (2nd Cir. 1977) *cert. den.* 431 U.S. 970; *United States* v. *Davis*, 548 F.2d 840 (9th Cir. 1977).

Assuming, *arguendo*, that Dunn lied in the Canges affidavit, he would not be prosecutable under federal statutes because he did not make his false statments in a proceeding cognizable under 18 U.S.C. §§ 1621 or 1623. Conversely, assuming he lied before the federal grand jury, his inconsistent declarations in the non-ancillary proceeding (i.e. the Canges affidavit) could provide extrinsic evidence to prove the falsity of his declarations before the grand jury [e.g. a § 1623(a) or 1621 prosecution] but could not be used to sustain a conviction under § 1623(c). Otherwise, any inconsistent statement arising out of any situation (e.g. to an F.B.I. agent, in a notarized document, etc.) would relieve the government of the burden of proving falsity under subsection a. The inconsistent declarations must be shown to have been made before a competent tribunal. See *United States* v. *Whimpy*, 531 F.2d 768, 770 (5th Cir. 1976); *United States* v. *Reinecke*, 524 F.2d 435 (D. C. Cir. 1975).

The trial court instructed the jury that two of the essential elements that had to be proved to sustain a conviction under § 1623(c) were as follows:

> "First, the defendant had made two or more declarations which are inconsistent to the degree that one of them is necessarily false. Second, said declarations were given in proceedings before or ancillary to a court or grand jury of the United States." (A. 58).

Since the indictment alleged irreconcilably inconsistent declarations in two separate proceedings, one of which was held not to be an ancillary proceeding within the meaning of the statute, Dunn's conviction under § 1623(c) cannot stand.

ARGUMENT II

The Appellate Court Amended The Indictment In Sustaining The Conviction

The indictment charged that Dunn made inconsistent declarations before the grand jury on June 16, 1976, and in the Canges affidavit on September 30, 1976. (A. 3-11). The only issue presented to the trial court and jury concerned whether Dunn had made irreconcilably inconsistent declarations in those proceedings. The Tenth Circuit in affirming the conviction, however, ruled that Dunn made inconsistent declarations in the June 16, 1976, grand jury proceedings and the October 21, 1976, Musgrave evidentiary hearing. (A. 75). The Musgrave evidentiary hearing was never pled in the indictment. (A. 76).[2]

[2] The appellate court itself noted:

> "In the indictment the government pleaded Dunn's grand jury testimony and Dunn's Canges statement, the latter of which we have determined is in and of itself not taken in a proceeding ancillary to the grand jury. While Dunn's testimony at the Musgrave hearing is clearly taken in a proceeding ancillary to the grand jury the government completely failed to plead such testimony in the indictment." (A. 76).

Furthermore, the Tenth Circuit correctly observed that the government did not attempt to prove the falsity of the grand jury testimony, yet it concluded that Dunn admitted he had in fact testified falsely before the grand jury.[3] (A. 79). The Court's conclusions completely disregarded the testimony in the record which indicated that independent evidence existed which corroborated Dunn's grand jury testimony. (A. 51-54).

The essence of an inconsistent declarations prosecution lies in the proof that the declarations pled are so inconsistent that one of them is necessarily false. 18 U.S.C. § 1623(c). The only declarations pled in the indictment in the present case arose out of the June 16, 1976, grand jury testimony and the September 30, 1976, Canges affidavit. Yet the trial court permitted evidence of Dunn's statements in the October 21, 1976, evidentiary hearing to turn an otherwise non-ancillary proceeding into an ancillary proceeding.[4] The

[3] "In response to Dunn's request for a bill of particulars, the government claimed to rely under § 1623(c). The government and Dunn proceeded upon this theory of the case. For example, Dunn's counsel properly concluded that evidence to show that Dunn's June grand jury testimony was in fact true would be irrelevant in a § 1623(c) prosecution. *** Of course, if the government had not chosen to proceed upon the inconsistent declarations theory, the government would have had to state which statements it intended to prove false, and demonstrate that in fact such specified testimony was true." (A. 74).

[4] "THE COURT: The Court at this time is holding that they are admissible and that those statements, taken in concert, either individually or in concert with the acknowledgment by the defendant before Judge Winner in an adversary proceeding when the defendant was represented by counsel, and he confirmed the falsity of the statements before a court reporter outside of court, supports this Court's view that that channeled its way into being an ancillary proceeding. If not initially, at least it was confirmation when the same confirmation was made before Judge Winner.

MR. SEARS: For the record, I would merely state then that the statements before Judge Winner were not charged in this indictment, and it is an improper extension of this indictment." (R. Vol. II, 108-109).

appellate court also relied upon this extraneous evidence in holding that inconsistent declarations were made in two proceedings before or ancillary to a U. S. Court or grand jury. Each court permitted a variance from and/or amendment to the indictment.

The Fifth Amendment provides that no person shall be held to answer for an infamous crime unless on a presentment or indictment of a grand jury. Once the grand jury has acted, it is improper for the trial or appellate courts to materially change or divert from the allegations in the indictment.

> "If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggest changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the constitution says 'no person shall be held to answer,' may be frittered

away until its value is almost destroyed." *Ex Parte Bain*; 121 U.S. 1, 9-10 (1886).

In *Stirone* v. *United States*, 361 U.S. 212 (1960) this Court found that the trial court improperly allowed the government to introduce evidence of transactions in interstate commerce in a Hobbs Act prosecution which varied from those alleged in the indictment. The Court held that proof at trial of the uncharged acts or transactions amounted to an amendment of the indictment with respect to the element of interstate commerce.

In the present case, the trial and appellate courts looked to proceedings other than those charged in the indictment to find that Dunn made declarations in ancillary proceedings. The trial court bootstrapped a nonancillary proceeding (the Canges affidavit) into an ancillary proceeding and the appellate court fulfilled that necessary element by looking to a proceeding not charged in the indictment.

> "To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." *Russell* v. *United States*, 369 U.S. 749, 770 (1962).

The Tenth Circuit acknowledged the deficiency in the government's case when it stated:

> "The government has repeatedly stated its reliance upon § 1623(c) in this case. Therefore, to state an offense under that statute, the government had to allege inconsistent statements by Dunn made in one, or more proceedings ancillary to a grand jury or court. In the indictment the government pleaded Dunn's grand jury testimony and Dunn's Canges statement, the latter of which we have determined is in and of itself not taken not in proceeding ancillary to the grand jury. While Dunn's testimony at the Musgrave hearing is clearly taken in a proceeding ancillary to the grand jury the government completely failed to plead such testimony in the indictment." (A. 76). (Emphasis added).

The appellate court correctly determined that the government had to allege inconsistent declarations in one or more proceedings ancillary to or before a court or grand jury under § 1623(c) but ruled that one of the two proceedings alleged did not qualify. It concluded that the Musgrave hearing did qualify as an ancillary proceeding but was not charged in the indictment. Thus, its ultimate ruling that a fatal variance did not occur by the government's introduction of the Musgrave statements is not consistent with its underlying conclusions.

Departures from the allegations contained in an indictment may take two forms, amendment and variance.

> "An amendment of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or Court after the grand jury has last passed upon them. A variance occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment. An amendment is thought to be bad because it deprives the defendant of his right to be tried upon the charge in the indictment as found by the grand jury and hence subjected to its popular scrutiny. A variance is thought to be bad because it may deprive the defendant of notice of the details of the charge against him and protection against reprosecution." (*Gaither* v. *United States*, 413 F.2d 1061, 1071-1072 (D. C. Cir. 1969).

Petitioner contends that he has been the victim of both a variance from and an amendment to the indictment. A variance took place when the trial court permitted introduction of the Musgrave testimony (even though it was not charged in the indictment) and subsequently ruled that the Canges affidavit "channeled its way into being an ancillary proceeding" when Dunn reaffirmed it in the Musgrave hearing. (R. Vol. II, 109). An amendment to and variance from the indictment took place at the appellate level. The Tenth Circuit amended the indictment when it found, on the one hand, that one or more proceedings before or ancillary to a court or grand jury had to be charged under § 1623(c), yet held that the Musgrave

hearing (though not pled) was an ancillary proceeding. The Tenth Circuit also committed a prejudicial variance in looking to the Musgrave testimony in concluding that Dunn had "admitted he lied to the grand jury." (A. 79).

The nature of the offense charged may determine whether a constructive amendment to or variance from the charge has occurred. *United States* v. *Crocker*, 568 F.2d 1049, 1060 (3rd Cir. 1977). When the grand jury has specified the manner in which perjury has been committed, i.e., inconsistent declarations in two particular proceedings, sustaining a conviction on a theory entirely different from that submitted to the jury amounts to a constructive amendment of the indictment. *Id.* The Tenth Circuit found that inconsistent declarations had been made in the Musgrave hearing and before the grand jury; it therefore sustained the conviction on "an entirely different factual basis for falsity" than that considered by the grand jury. *Id.* Neither the reviewing court or the trial court is free to change the charging part of an indictment to suit its own notion of what it ought to have been. *Jeffers* v. *United States*, 392 F.2d 749, 752 (9th Cir. 1968).

ARGUMENT III

Dunn's Immunized Grand Jury Testimony Should Not Have Been Used To Establish The Corpus Delicti Of An Inconsistent Declarations Prosecution

A. Use immunity is coextensive with the Fifth Amendment Privilege.

On June 16, 1976, Robert Dunn appeared before a federal grand jury and claimed his Fifth Amendment privilege against self-incrimination. (R. Vol. I, pp. 1-2; A. 20). The government applied to U. S. District Court to order Dunn to testify notwithstanding his claim of privilege upon the promise that his testimony would not be used against him "in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with order." (A. 24). Dunn contends that the government's failure to bring him within one of the exceptions to the immunity order and its use of his testimony in an inconsistent declarations prosecution violated his Fifth Amendment rights and breached the court's promise of immunity.

The court's order of immunity read as follows:

> "THEREFORE, it is hereby ordered as follows:
>
> 1. That the witness ROBERT DWIGHT DUNN give testimony and provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination

> and that the witness is not excused from testifying or providing other information on the ground that such testimony or information may incriminate him or subject him to penalty or forfeiture;
>
> 2. That no testimony or other information compelled under this order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness ROBERT DWIGHT DUNN in any criminal case, in any court, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this order." (A. 24).

Title 18, United States Code, § 6002, the use immunity statute, contains the same guarantee. As will be argued below, an inconsistent declarations prosecution under § 1623(c) does not fall within the perjury or false statement exception to § 6002.

When Dunn was compelled to testify despite his claimed privilege to remain silent, he was ordered to tell the truth in exchange for a promise that his testimony would not be used against him. It was not shown that he didn't testify truthfully before the grand jury. To the contrary, testimony was elicited to establish that independent evidence existed to corroborate his grand jury testimony. (A. 51-54).

The Tenth Circuit agreed with Dunn that the truth of his grand jury testimony was irrelevant under a § 1623(c) prosecution. (A. 74). Yet it also ruled that the immunized testimony could be used against him

because he admitted that he lied to the grand jury in the Canges affidavit and in the evidentiary hearing. (A. 79). The Court's ruling disregarded the evidence which indicated that he had not lied to the grand jury and adopted a theory of proof never asserted at trial. The theory of prosecution under § 1623(c) did not require the government to show falsity before the grand jury and the government repeatedly declined the opportunity to do so.

It is well established that use immunity is coextensive with the Fifth Amendment privilege. *Kastigar* v. *United States,* 406 U.S. 441 (1972); *United States* v. *Alter,* 482 F.2d 1016 (9th Cir. 1973). "It prohibits the prosecutorial authorities from using the compelled testimony in any respect and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." *Kastigar* at p. 453. When a witness' claim of privilege is set aside under an order of immunity and he is directed to testify against his will, the exclusionary rule leaves the witness in substantially the same position as if he had remained silent. *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 79 (1964). See *United States* v. *Apfelbaum,* 584 F.2d 1264, 1269 (3rd Cir. 1978). Since Dunn was not shown to have given a false statement or to have committed perjury while under immunity, his testimony should not have been used against him.

B. An inconsistent declarations prosecution does not fall within the perjury or false statement exception to the immunity statute.

Title 18, United States Code, § 1623(c) provides, in part:

> "An indictment or information for violation of this section alleging that in any proceeding before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are *inconsistent to the degree that one of them is necessarily false, need not specify which* declaration is false . . . " 84 Stat. 932; Title 18, United States Code, Section 1623(c) (as amended, 1970) (Emphasis added).

Paragraph 4 of each count of the indictment incorporated the declarations Dunn made before the federal grand jury on June 16, 1976. Paragraph 5 reiterated Dunn's declarations in the Canges affidavit of September 30, 1976. (A. 3-10). Paragraph 6 of each count alleged that "the aforesaid declarations by Robert Dunn, as set forth in paragraphs four and five of the Count ____ were inconsistent to the degree that *one of said declarations was false* and known by him to be false when made." (Emphasis added) (A. 4, 5, 7, 9, 11). The government represented prior to and throughout the trial that it had selected an inconsistent declarations method of proof under § 1623(c). (A. 18, 57-58).

Section 1623 provides two methods of proving false declarations before a court or grand jury of the United States. The government may specifically prove that certain declarations were false when made before a court or grand jury or a proceeding ancillary thereto. Alternatively, if two or more declarations were made in one or more such federal proceedings, the government may prove falsity under § 1623(c) if it can show that the declarations were inconsistent to the degree that one of them was necessarily false. The government clearly elected the latter theory. No attempt was made to prove the grand jury testimony false by use of the Canges statement and/or the subsequent testimony in the evidentiary hearing of October 21, 1976. (A. 18, 57-58).

Both the use immunity statute, 18 U.S.C. § 6002, and the false declarations statute, 18 U.S.C. § 1623, were passed by Congress under the Organized Crime Control Act of 1970, Pub. L. No. 91-452 (1970). The use immunity provision guaranteed that testimony compelled under immunity would not be used against the witness in any criminal case "except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." 84 Stat. 927, 18 U.S.C. § 6002.

The legislative history is unclear as to how broadly the exception to immunity is to be construed. If, however, the phrase "otherwise failing to comply with the order" is read in conjunction with the preceding language, "perjury" and "false statement", the most

reasonable interpretation is that Congress intended for immunity to be lost by *violating the immunity order* in some way. In particular, instances of violating the order would be by perjury, false statement, or contempt.

If the immunized testimony is truthful, then the immunity order has not been violated and the plain words of the exception are simply not met. As long as the order is complied with, the immunity is binding and the testimony cannot be used against the witness.

An immunized witness can make inconsistent declarations in two separate proceedings without violating his immunity order. If he testified truthfully under immunity but made inconsistent declarations either earlier or subsequent thereto, he cannot have his immunized declarations used against him in a prosecution under § 1623(c). The appellate court in *Housand* recognized the problem and opined that "(i)f the immunized prior testimony was truthful, it may not be used against the witness who, on the second occasion, lies under oath." *United States* v. *Housand*, 550 F.2d 818, 823 (2nd Cir. 1977) *cert. den.* 431 U.S. 970. If, however, the prior immunized testimony is shown to be false, it may "be the predicate for a perjury prosecution. (Citations ommitted)." *Id.* at p. 823. The perjury, however, would have to be proved by extrinsic evidence.[5]

[5] "Even if we assume that a perjury count based merely on the contradiction (18 U.S.C. § 1623(c)) would not stand up, because

The language of the immunity statute refers only to perjury or false statements, not inconsistent declarations. Apparently Congress did not feel it necessary to even include the perjury exception since it has traditionally been known to be an exclusion from the immunity umbrella.

> "The exception for perjury, false statements or other failure to comply with the order is probably unnecessary. See *United States* v. *Monia*, 63 S.Ct. 409, 317 U.S. 424, 87 L.Ed. 376 (1943). It is included out of caution to insure that such immunity is not given. See *United States* v. *Orta*, 253 F.2d 312 (5th Cir.), *cert. den'd.*, 78 S.Ct. 1149, 357 U.S. 905, 2 L.Ed. 2d 1156 (1958)." Organized Crime Control Act, Title IV, U.S. Code Congr. and Admin. News, 91st Cong., 2nd Sess., 1970, p. 4018.

Interestingly, the cases which the legislative history cites concerned species of perjury which predated the passage of the inconsistent declarations statute. It is therefore reasonable to conclude the Congress contemplated an exception no broader than that traditionally known under prior immunity statutes.

> "To interpret this perjury exception to include a prosecution under 1623(c) for inconsistent

the original perjury would not be admissable until it is shown to be false, the giving of truthful testimony on the second occasion could surely trigger investigation of whether the original testimony was false, and whether that could be proved by extrinsic evidence. This is a reasonable cause for apprehension, and supports the claim of privilege." *United States* v. *Housand*, 550 F.2d 818, 823 (2nd Cir. 1977) *cert. den.* 431 U.S. 970.

> statements, some of which were made prior to the latest grant of immunity, would be too broad of a reading of 6002." *United States* v. *Patrick*, 542 F.2d 381 (7th Cir. 1976) *cert. den.* 430 U. S. 931.

Several courts have recently held that immunized testimony may not be used to establish the *corpus delicti* of an inconsistent declarations prosecution. *United States* v. *Berardelli*, 565 F.2d 24 (2nd Cir. 1977); *United States* v. *Housand*, 550 F.2d 818 (2nd Cir. 1977) *cert. den.* 431 U.S. 970; *United States* v. *Patrick*, 542 F.2d 381 (7th Cir. 1976) *cert. den.* 430 U. S. 931.

> "We believe such use was not intended by Congress to come within the exception found in 6002 that the compelled testimony may be used in 'a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.'" *United States* v. *Patrick*, 242 F.2d at p. 385.

The courts have reasoned that a witness cannot be compelled to testify under an order of immunity only to worry about inconsistent declarations that may have been made at another time. *United States* v. *Housand*, 550 F.2d 818 (2nd Cir. 1977) *cert. den.* 431 U.S. 970; *United States* v. *Watkins*, 505 F.2d 545 (7th Cir. 1974); *United States* v. *Alter*, 482 F.2d 1016 (9th Cir. 1973); *United States* v. *Doe* 361 F.Supp. 226 (E.D. Penn. 1973) *aff'd* 485 F.2d 682 (3rd Cir. 1973) *cert. den.* 415 U.S. 989. It is generally agreed that it is

perjury committed in contravention of the immunity order that is excepted for use. *United States* v. *Tramunti*, 500 F.2d 1334, 1342-44 (2nd Cir. 1974) *cert. den.* 419 U.S. 1079; *United States* v. *Patick, supra.*

In *United States* v. *Patrick*, 542 F.2d 381 (7th Cir. 1976) *cert. den.* 430 U.S. 931, it was the government who argued that immunized testimony could not be used against a witness in an inconsistent declarations prosecution. Patrick had testified before a federal grand jury under use immunity three times. As a result, an indictment was returned against a police officer charging failure to report income subject to tax arising out of gambling activities. At trial, Patrick was once again granted immunity and ordered to testify. He continually refused on the grounds that he might subject himself to prosecution for inconsistent declarations under 18 U.S.C. § 1623(c). He claimed use immunity under §§ 6002-6003 did not protect him. Patrick was convicted of criminal contempt under Rule 42(b) of the Federal Rules of Criminal Procedure and sentenced to a term of four years. In Patrick's appeal, the government successfully argued that "Patrick's immunity would extend to protection under § 1623(c) because the use of any immunized testimony to demonstrate Patrick's having made inconsistent declarations would be forbidden by the immunity statute as interpreted in *Kastigar* v. *United States*, 406 U.S. 441, 92 S.Ct. 1643, 32 L.Ed 2d 212 (1972)." *Patrick* at p. 385. The Seventh Circuit agreed in sustaining Patrick's conviction.

The government cannot, on the one hand, continue to ask the courts to compel immunized witnesses to testify by arguing that use immunity protects them against inconsistent declarations prosecutions, but on the other, institute a § 1623(c) prosecution if the witness testifies inconsistently. The government and the courts simply cannot have it both ways. If the government can prove that the witness testified falsely while under immunity, it may prosecute him for perjury under § 1621 or § 1623(a) but cannot rely on an inconsistent declarations prosecution under § 1623(c). "The sanction of the perjury statute adequately protects against a witness making a mockery of immunity." *United States* v. *Apfelbaum*, 584 F.2d 1264, 1270 (3rd Cir. 1978).

Use immunity cannot be entered on behalf of a witness unless the government specifically applies for it. 18 U.S.C. § 6003. When the government applies to U. S. District Court for immunity, it represents to the court and the witness that it won't use the compelled testimony aginst the witness in exchange for the information received. It, of course, expects the information to be truthful. If, however, it turns out to be false, the government must be compelled to prove it false before it can breach its promise to the witness.The government's remedy is a perjury prosecution under § 1621 or a false declarations prosecution under § 1623(a).

The inconsistent declarations method of proof under § 1623(c) relieves the government of the burden of

proving falsity. If the government is unable or *unwilling* to prove that the immunized witness breached his promise by testifying falsely, it cannot be permitted to ignore its end of the bargain by using the immunized testimony against the witness. Petitioner submits that this court can reconcile 18 U.S.C. § 1623(c) with the use immunity statute and the Fifth Amendment only by holding that immunized testimony cannot be used to establish the *corpus delicti* in inconsistent declarations prosecutions.

CONCLUSION

For the reasons stated, petitioner respectfully requests this Honorable Court to reverse the judgment of the Court of Appeals and remand the case with instructions to enter a judgment of acquittal on his behalf.

Respectfully submitted,

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FOR ARGUMENT

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OCTOBER TERM, 1978

ROBERT DUNN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-6949

ROBERT DUNN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 70-80) is reported at 577 F.2d 119.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1978. The petition for a writ of certiorari was filed on June 20, 1978, and was granted on December 11, 1978 (A. 82). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the sworn statement that was alleged to be inconsistent with petitioner's grand jury testimony was made in a "proceeding * * * ancillary to a court," within the meaning of 18 U.S.C. 1623(c).

2. Whether a witness who has testified before a grand jury under a grant of immunity and subsequently gives contradictory non-immunized testimony in a proceeding before or ancillary to a court may have his immunized testimony used against him in a false declarations prosecution based on the inconsistent statements theory of 18 U.S.C. 1623(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * * nor shall be compelled in any criminal case to be a witness against himself * * *.

18 U.S.C. 1623 provides:

> (a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> (b) This section is applicable whether the conduct occurred within or without the United States.
>
> (c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—
>
> (1) each declaration was material to the point in question, and
>
> (2) each declaration was made within the period of the statute of limitations for the offense charged under this section.
>
> In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.
>
> (d) Where, in the same continuous court or grand jury proceeding in which a declaration is

made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

18 U.S.C. 6002 provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

STATEMENT

1. On June 16, 1976, petitioner testified before a federal grand jury under a grant of immunity (see 18 U.S.C. 6002). The grand jury was investigating illegal drug activity at the Colorado State Penitentiary, where petitioner had been confined (Tr. 48-51). Petitioner's testimony implicated a fellow inmate, Phillip Musgrave, in various drug-related offenses at the penitentiary. Specifically, petitioner testified that he obtained drugs in the penitentiary from Musgrave (A. 27); that he made telephone calls to one of Musgrave's girl friends and gave her coded messages concerning Musgrave's drug activities (A. 29-30); and that Musgrave subsequently gave him a list of chemicals used to manufacture methamphetamine, a controlled substance, and asked him to obtain the chemicals for him (A. 32; Tr. 53). Following petitioner's testimony, the grand jury indicted Musgrave and others on felony charges of conspiring to manufacture and distribute methamphetamine (Tr. 45, 54).

Approximately three months later, on September 30, 1976, petitioner went to the office of Michael Canges, Musgrave's attorney, where he gave a statement under oath in which he recanted his grand jury testimony implicating Musgrave (A. 33-42). He testified at that time that Musgrave had never given him drugs in the penitentiary (A. 37); that he had not

given Musgrave's girl friend any telephone messages regarding Musgrave's drug activities (A. 38); and that Musgrave had never given him a list of chemicals to obtain for any purpose (A. 39). Musgrave's attorney filed a transcript of petitioner's statement in the district court where Musgrave's prosecution was pending and moved to dismiss the indictment, alleging that it was based on perjured testimony (Tr. 56). The statement was entitled an "affidavit," although it was submitted to the court in transcript form (*ibid.*).

On October 21, 1976, an evidentiary hearing on Musgrave's motion was held in the district court. Petitioner testified at the hearing and adopted the sworn statement he had given at Canges' office. On examination by Canges, petitioner testified as follows (A. 46):

Q. At that time did I ask you certain questions and did you make certain answers to those questions?

A. Yes, sir, I did.

Q. And at that time did you tell the truth, the whole truth, and nothing but the truth?

A. I did, sir.

Q. Mr. Dunn, have you had occasion to review that certain transcript or affidavit of the conversation or colloquy that transpired on September 30th?

A. Yes, sir, all but about the last five or ten pages.

Q. And referring to that affidavit—

MR. CANGES: For the record, that would be the affidavit that was tendered to this Court, a copy of which has been tendered to both the United States and to co-counsel.

Q. Mr. Dunn, with reference to that affidavit, and now having had the occasion to again review it, are the contents of that affidavit true?

A. Yes, sir.

Q. With reference to your testimony before the grand jury, as I understand it, your testimony encompassed acts over a period of some several years with reference to certain statements that you made concerning alleged distribution of methamphetamines on behalf of Mr. Musgrave and other co-defendants, am I correct?

A. Yes, sir.

Q. Was what you told the grand jury true?

A. No, sir.

Q. Was any part of it true?

A. Possibly ten percent.

This testimony was volunteered by petitioner, who had received no grant of immunity with respect to any statement he made at the hearing.

As a result of petitioner's sworn statement and his testimony at the evidentiary hearing, the government reduced the charges against Musgrave to possession of methamphetamine, a misdemeanor (see 21 U.S.C.

844) (Tr. 76-77). Musgrave agreed to plead guilty to that charge (*ibid.*).

2. Petitioner was then indicted in the United States District Court for the District of Colorado for making false declarations in a proceeding before or ancillary to a grand jury or a court, in violation of 18 U.S.C. 1623 (A. 3-11). The indictment charged that his testimony before the grand jury was inconsistent with various statements he had made "on September 30, 1976, while under oath as a witness in a proceeding ancillary to *United States* v. *Musgrave, et al.*, * * * to the degree that one of said declarations was false and known by him to be false when made" (A. 4). In response to petitioner's motion for a bill of particulars, the government indicated it would rely on the inconsistent statements theory authorized by subsection (c) of Section 1623 in proving its case (A. 17-18). The government's reliance on the inconsistent statements theory was also made clear to the trial court and to the jury (A. 56-58). At trial the government introduced the relevant portions of petitioner's grand jury testimony, his sworn statement to Musgrave's attorney, and his testimony at the evidentiary hearing (A. 72).

Petitioner objected to the introduction of his grand jury testimony on the ground that the use of that testimony would violate the grant of immunity that he had been given prior to testifying before the grand jury (Tr. 41). He objected also to the introduction of the transcript of the October 21 evidentiary hearing on various grounds including relevance (Tr. 81). The court overruled both objections (Tr. 41, 86).

At the close of the government's case, petitioner moved for judgment of acquittal on all counts, again arguing that his testimony before the grand jury could not be used to establish the *corpus delicti* of a false declarations prosecution (Tr. 96). He also moved for judgment of acquittal on the ground that the September 30 statement in Canges' office was not made in a proceeding ancillary to or before a federal court or grand jury (Tr. 97). The court denied the motion, ruling that petitioner's grand jury testimony could properly be used to prove perjury (Tr. 107) and that the September 30 statement was made in a proceeding ancillary to a grand jury, at least as of the time he reaffirmed that statement at the October 21 hearing in district court (Tr. 108-109).

In summation, petitioner's counsel argued to the jury that although the September 30 statement was made under oath, it was not made in a proceeding ancillary to a grand jury, but instead was merely "a statement made to a private attorney that had some bearing on this case" (Tr. 151). The prosecutor responded that the September 30 statement was made in a proceeding ancillary to a court because it was made in connection with the Musgrave prosecution and because it was made the subject of the October 21 evidentiary hearing in district court (Tr. 167).

The court instructed the jury that it had to find that petitioner's declarations were made in a proceeding before or ancillary to a court (Tr. 179). The

court, however, was not requested by either party to define those terms, and it did not do so.[1] The jury returned a verdict of guilty on three of the five counts in the indictment (A. 72). Petitioner was sentenced to concurrent five-year terms of imprisonment on each count (S. Tr. 19).[2]

3. On appeal, petitioner contended that the sworn recantation given in Canges' office could not form the basis for a false declarations prosecution under 18 U.S.C. 1623, and that, in any event, the prosecution could not use petitioner's immunized grand jury testimony in a false declarations prosecution based upon an inconsistent statements theory.

As to the first contention, the court of appeals agreed with petitioner that his sworn statement in Canges' office on September 30, 1976, was not a statement "in any proceeding before or ancillary to any court or grand jury" within the meaning of Section 1623 (A. 75). Nevertheless, the court held that petitioner's subsequent affirmation of the recantation during the hearing on Musgrave's motion to dismiss on October 21, 1976, could sustain the prosecution. Al-

[1] Petitioner objected to the court's use of the phrase "in any proceeding before or ancillary to a court or jury," but only because it suggested that the jury "may select certain statements which may have been made in a proceeding ancillary to or before a U.S. Court or grand jury proceeding, and suggests that not all statements or declarations need to be made in any such proceeding" (Tr. 116-117).

[2] "S. Tr." refers to the transcript of the sentencing hearing on May 23, 1977. It is identified as Volume V of the record in the court of appeals.

though the indictment specified September 30 as the date of the ancillary proceeding rather than October 21, the court of appeals concluded that this discrepancy constituted simply a variance between the indictment and the proof at trial. The variance was not fatal in this case, the court held, because petitioner's testimony in the October 21 hearing was "inextricably related" to his September 30 statement (A. 76), and he could have anticipated that the evidence of his testimony at the October 21 hearing would be presented against him at trial (*ibid.*).

As to the second contention, the court of appeals held that it was not error for the government to use petitioner's immunized grand jury testimony against him. The court stated that although truthful testimony given under immunity cannot be used to incriminate the witness for crimes about which he testifies, perjured testimony is not protected by the grant of immunity and may be used to prove the witness's perjury or false declarations (A. 77-78). The court also accepted the proposition that immunized testimony may not be used to establish the *corpus delicti* of an inconsistent declarations prosecution without a prior showing that the immunized testimony is false (A. 79). The court found, however, that petitioner's "subsequent testimony in his Canges affidavit and in the Musgrave motion hearing not only [was] inconsistent with his immunized grand jury testimony, but, significantly, *contained [petitioner's] admission that he had in fact testified falsely before the grand jury*" (*ibid.*; emphasis in original).

The court concluded that petitioner's "unequivocal admission that his immunized testimony before the grand jury was false justified the use of such immunized testimony to establish the *corpus delicti* of the present prosecution" (A. 80). Petitioner had "grossly abused" the grant of immunity, the court reasoned, and his recantation "in legal effect left him in no better position than he would have been in had the Government formally withdrawn its offer of immunity before he testified before the grand jury" (*ibid.*, citing *Shotwell Manufacturing Co.* v. *United States*, 371 U.S. 341, 349-350 (1963)).

SUMMARY OF ARGUMENT

It is clear in this case that petitioner lied under oath, either before the grand jury or in his September 30 statement. It is also clear that his false testimony has adversely affected the administration of justice, either by falsely accusing Musgrave before the grand jury or by falsely exonerating him in a manner that resulted in a substantial reduction of the charges against him. Petitioner contends, however, that his conviction for false swearing should be overturned because his September 30 statement was not made in a proceeding covered by the false declarations statute and because his immunized grand jury testimony was improperly used to prove that he lied, either before the grand jury or in his subsequent statement on September 30.

I.

1. The false declarations statute, 18 U.S.C. 1623, proscribes the making of false statements under oath "before or ancillary to any court or grand jury." A violation of the statute can be established without the need to prove that a particular statement is false if the prosecution can show that the defendant made at least two sworn statements that are so clearly inconsistent that at least one of them must be false. See 18 U.S.C. 1623(c). The government in this case charged and proved that petitioner's testimony before the grand jury was irreconcilably inconsistent with his September 30 statement. Petitioner's grand jury testimony was clearly covered by the statute. The first question presented by the case is whether his September 30 statement was also within the reach of the statute.

Petitioner's September 30 statement was a sworn statement taken by Musgrave's lawyer in connection with the criminal action against Musgrave, whom petitioner had implicated before the grand jury. The statement was submitted in the form of an affidavit to the district court in support of a motion to dismiss the indictment against Musgrave. Petitioner subsequently testified in an evidentiary hearing on the motion to dismiss, and he affirmed the truth of his September 30 statement at that time.

Section 1623 does not define the term "proceeding * * * ancillary to any court," but the legislative history of the statute suggests that the term was

included in the statute to bring within the reach of the statute statements such as affidavits, depositions, and certificates prepared for use in connection with a court proceeding. The September 30 proceeding clearly fit within that description. Petitioner's statement was taken in connection with the criminal proceeding against Musgrave and for use in that proceeding, a use in which petitioner actively participated by testifying at the October 21 evidentiary hearing and reaffirming the truth of his sworn statement. Accordingly, petitioner's September 30 statement was made in a proceeding ancillary to a court.

2. We do not agree with the court of appeals that if the September 30 statement was not made in a proceeding ancillary to a court, petitioner's conviction can nonetheless be affirmed. The court of appeals noted that the October 21 hearing was indisputably a proceeding "before * * * a court" within the meaning of Section 1623 and that petitioner's adoption of the September 30 statement at that time subjected him to prosecution for making inconsistent declarations before the grand jury and at the October 21 hearing. From that premise, the court concluded that there was simply a non-prejudicial variance in this case between the charge in the indictment and the proof at trial. In our view, this case presents neither a variance nor, as petitioner contends, an impermissible amendment of the indictment, because the charge in the indictment, the government's theory at trial, and the jury's verdict were all based on an inconsistency

between petitioner's grand jury testimony and his September 30 statement. The fact that the proof also showed that petitioner made an inconsistent statement at the evidentiary hearing on October 21 cannot support his conviction, however, since the conviction was not based on that charge. Therefore, if the Court disagrees with our contention that the September 30 statement was made in a proceeding ancillary to a court, we submit that petitioner's conviction cannot be upheld on the ground employed by the court of appeals.

II.

We also disagree with the court of appeals in its analysis (although not its disposition) of the second question presented by this case: whether petitioner's immunized grand jury testimony was properly used to prove that he lied under oath, either before the grand jury or subsequently in his September 30 sworn statement. The court of appeals held that because petitioner had stated that his grand jury testimony was false, it could be used under the theory that false immunized testimony is unprotected and may be used for any purpose. The problem with this analysis is that under the inconsistent declarations theory of proof used at trial, a conviction could have rested on a finding that petitioner's grand jury testimony was true and his subsequent sworn statement false. The grand jury testimony was therefore not used for its falsity, and the jury's verdict did not establish that it was false. For that reason, petitioner's conviction can stand only if his grand jury testi-

mony could properly be used at trial even if it were truthful.

1. It is our basic submission that the scope of the immunity acquired when a witness is compelled to testify over a claim of privilege is precisely ~~coexist-ent~~ coextensive with the scope of the privilege. Since the privilege did not entitle petitioner to refuse to testify on the ground that truthful testimony might be used against him in the event he subsequently decided to give false, inconsistent testimony, he acquired no immunity from such use of his compelled testimony.

After a valid claim of the privilege against compulsory self-incrimination, the government can compel a witness to testify by granting him immunity. In order to supplant the privilege, the immunity granted must be as broad as the privilege it displaces, but it need not be any broader. It is therefore necessary to determine the scope of the privilege at the time the witness's testimony is compelled in order to determine the scope of the immunity that is conferred.

The privilege protects a witness against being compelled to give testimony that subjects him to real and substantial risks of incrimination; it does not protect him against risks that are speculative or remote. In particular, the privilege ordinarily does not protect against the danger of incrimination for crimes the witness may choose to commit in the future. In this case, petitioner's privilege against compulsory self-incrimination entitled him to refuse to testify about the drug offenses that the grand jury was investigating until he was given a grant of immunity in

exchange for his testimony. Similarly, if petitioner had previously given a false sworn statement about the matters that were the subject of the grand jury questioning, he could validly have asserted his privilege not to testify because of the risk that his truthful testimony before the grand jury would generate evidence that could be used against him in a prosecution for false swearing on the prior occasion. But if he had asserted his privilege on the ground that his grand jury testimony would be incriminating if he should later choose to give materially inconsistent testimony, his claim would not have been upheld. The use of the privilege in that context would serve simply to give the witness increased freedom to perjure himself in the future, an interest the privilege plainly was not designed to protect.

Because petitioner could not have made a valid assertion of the privilege with respect to a possible future act of false swearing, the immunity he was granted to displace the privilege does not protect him from the use of his testimony to prove that he made a false declaration, either before the grand jury or in a subsequent sworn statement. The Fifth Amendment therefore does not prohibit the use of petitioner's immunized grand jury testimony to prove the false declarations offense charged in this case.

2. The federal immunity statute, 18 U.S.C. 6002, does not prohibit the use of petitioner's grand jury testimony in this case. The statute, by its terms, permits the use of immunized testimony in any prosecution for "perjury" or "giving a false statement,"

the latter of which plainly includes prosecutions for false declarations before a grand jury or a court. Petitioner's contention that the statute should be construed to exclude false declarations prosecutions based on the inconsistent declarations theory of proof is unsupported either by the language of the statute or its legislative history.

Petitioner argues that the language of the statute suggests a congressional intention to prohibit the use of immunized testimony in all cases except those in which the witness is charged with lying in the course of his immunized testimony or with violating the immunity order. The legislative history of the immunity statute, however, clearly shows that it was designed to confine the scope of the immunity to that required by the Constitution, and no more. The legislative materials further show that the statutory language on which petitioner relies was included not to limit the uses of immunized testimony more strictly than the Constitution permits, but simply out of caution, so that the statute would not be construed to prohibit the use of immunized testimony for the listed purposes.

The same policies that underlie the "perjury" exception to the use immunity statute apply as well to the use of immunized testimony in inconsistent declarations prosecutions. Perjury under a grant of immunity renders the compelled testimony worthless to the grand jury, and barring the government from using a witness's immunized testimony to prove that it is false would permit grand jury witnesses to lie

with impunity and thus to undercut the investigative function of the grand jury. Similarly, when a witness repudiates his grand jury testimony under oath he impairs the value of his testimony and subverts the grand jury's investigative efforts. Yet under petitioner's argument, unless the government has some reliable way of proving which of the two statements is false, a witness is free to repudiate his immunized grand jury testimony with impunity. We submit that neither the immunity statute nor the Fifth Amendment compels that unpalatable result.

ARGUMENT

I.

THE PROOF ESTABLISHED, AND PETITIONER WAS CONVICTED OF, THE OFFENSE CHARGED IN THE INDICTMENT

A. The September 30 "Canges Statement" Was Made in a Proceeding Ancillary to a Court

Section 1623 of the Criminal Code makes it an offense for a person knowingly to make a false material declaration under oath in any proceeding before or ancillary to any court or grand jury of the United States. Subsection (c) of Section 1623 provides that a violation of the statute can be established by proof that, in any proceeding before or ancillary to a court or grand jury, the defendant has made two or more declarations that are inconsistent to the degree that at least one of them is necessarily false. The government used this "inconsistent declarations" method of

proof in establishing a violation of Section 1623 in this case.

With respect to each count, the indictment charged that petitioner's grand jury testimony and his sworn statement of September 30, 1976, were inconsistent. Prior to trial the government made it clear to the court and defense counsel that it intended to rely on the inconsistent declarations method of proof permitted by Section 1623(c) to show that with respect to each count in the indictment at least one of the two conflicting sworn statements was false. The court properly charged the jury on the inconsistent declarations theory that the government relied upon.

Petitioner contends (Br. 10-13) that his September 30 sworn statement was not made in a "proceeding * * * ancillary to a court" and that the testimony he gave at that time therefore cannot supply a part of the *corpus delicti* of the false statements offense. Thus, petitioner argues, the indictment failed to charge an offense under Section 1623, at least in the absence of proof that it was his grand jury testimony, rather than his testimony at the September 30 proceeding, that was false.

The term "proceeding * * * ancillary to any court or grand jury" is not defined in Section 1623 or elsewhere in the Criminal Code. Nor had it been construed in any appellate court decision prior to this case. But the legislative history of the provision, the experience under the federal perjury statute, 18 U.S.C. 1621, and the few court decisions touching on the issue support the proposition that sworn state-

ments prepared outside the court are within the reach of Section 1623 if the sworn statements are prepared for the purpose of submission to the court or grand jury.

The purpose of the false declaration statute, like the purpose of the federal perjury statute, is to protect courts and grand juries from the contamination of false swearing.[3] See *Bronston* v. *United States*, 409 U.S. 352, 357 (1973); *United States* v. *Williams*, 341 U.S. 58, 68 (1951); S. Rep. No. 91-617, 91st Cong., 1st Sess. 58-59 (1969). False swearing in an affidavit that is submitted to a court subjects the court to the same abuse as false testimony in open court, since a court often relies on sworn documentary evidence in the same fashion that it relies on sworn testimony.

For that reason, it is clear that false swearing in an affidavit authorized to be filed in a judicial proceeding violates Section 1621. See, *e.g.*, *United States* v. *D'Amato*, 507 F.2d 26, 29 (2d Cir. 1974); *United States* v. *Birrell*, 470 F.2d 113 (2d Cir. 1972); *Ely Valley Mines, Inc.* v. *Lee*, 385 F.2d 188 (9th Cir. 1967); *Butler* v. *McKey*, 138 F.2d 373 (9th Cir. 1943), cert. denied, 321 U.S. 780 (1944). Thus, contrary to petitioner's assertion (Br. 12), he could

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[3] The federal perjury statute, 18 U.S.C. 1621, also serves to protect other entities from false swearing. See, *e.g.*, *United States* v. *Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977) (Congress); *United States* v. *Kline*, 366 F. Supp. 994 (D.D.C. 1973) (SEC); *United Federation of Postal Clerks* v. *Blount*, 325 F. Supp. 879 (D.D.C.), affirmed, 404 U.S. 802 (1971) (Postal Service).

have been prosecuted for perjury under Section 1621 for making the September 30 sworn statement, if the government had been able to prove that the contents of that statement were actually false rather than merely irreconcilably inconsistent with his grand jury testimony.[4]

False swearing in affidavits and other out-of-court statements has been held to violate Section 1623 as well. For example, in *United States* v. *Stassi*, 583 F.2d 122 (3d Cir. 1978), the defendant was convicted on a false declarations charge for making inconsistent declarations in a Rule 11 proceeding before a court and in a subsequent affidavit filed in support of his Section 2255 motion to vacate his sentence. The court of appeals had no difficulty finding that the Section 2255 affidavit constituted a statement in a proceeding "before or ancillary to" a court. As the court of appeals noted, "[a] false material declaration, knowingly made, in a § 2255 affidavit or hearing offends the administration of criminal justice as much as a

[4] Petitioner's September 30 statement was submitted to the court as an affidavit in support of Musgrave's motion to dismiss the indictment, as is authorized by Fed. R. Crim. P. 12(b)(4) and 47. His statement was taken under an oath given by an individual authorized by Colorado law to administer oaths (Tr. 24, 97; G. Ex. 2). And federal law permits persons so authorized by local law to administer oaths where the oath is authorized or required under the laws of the United States. 5 U.S.C. 2903(c)(2). Thus, the oath required for submission of the affidavit supporting Musgrave's motion to dismiss was taken "before a competent * * * person, in [a] case in which a law of the United States authorizes an oath to be administered," as is required by 18 U.S.C. 1621.

false material declaration made in any other 'proceeding before or ancillary to any court'" (*id.* at 127). Similarly, in *United States* v. *Krogh*, 366 F. Supp. 1255, 1256 (D.D.C. 1973), the district court held that a sworn deposition taken in an office in the Department of Justice was "a proceeding ancillary to the Watergate Grand Jury inquiry" because it was intended as a substitute for the defendant's testimony and was in fact subsequently read to the grand jury in lieu of live testimony by the defendant.

The practice of submitting sworn statements to a grand jury or in a court proceeding in place of or in addition to live testimony is, of course, a common one and one that is essential in many circumstances to the efficient disposition of the business of courts and grand juries. It would defeat the purposes of Section 1623 if an individual could escape the sanctions of that statute simply by submitting his false sworn statements to a court or a grand jury in documentary form rather than through live testimony. In order to guarantee that the penalties of perjury or giving false declarations would be available in such cases, the parties would have to call the declarant to the stand to reaffirm or repeat his sworn statement, thus wholly undercutting the advantages of proceeding on sworn statements taken other than in open court. Accordingly, Section 1623 is properly construed to reach not only sworn statements made before a court, but also sworn statements made outside the court for submission to the court in connection with a pending

court proceeding, *i.e.*, sworn statements made in proceedings "ancillary to [a] court."

The legislative history of Section 1623 confirms this interpretation of the statute. Section 1623 was enacted as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 932-933. The bill, as initially introduced, early in 1969, contained a version of Section 1623 that would have reached only those false statements made "in any trial, hearing, or proceeding before any court or grand jury." S. 30, 91st Cong., 1st Sess. 12 (1969), reprinted in *Measures Relating to Organized Crime: Hearings on S. 30, etc. Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 15 (1969) (hereafter "*Senate Hearings*"). The Department of Justice was asked for its comments on the bill, and among the comments was a criticism that the language of proposed Section 1623 was too narrow. The Department pointed out that, as drafted, proposed Section 1623 "is not as inclusive as the present Federal perjury statute in that [it] is limited specifically to 'any trial, hearing, or proceeding before any court or grand jury' and thus not only are pretrial depositions, affidavits, and certificates excluded but also administrative and legislative hearings or proceedings." *Senate Hearings*, *supra*, at 372, 379-380. See also S. Rep. No. 91-617, 91st Cong., 1st Sess. 110-111 (1969). In his testimony before the Committee, Assistant Attorney General Will Wilson summarized this point by stating, "[w]e favor including other testimony, preliminary testimony and other

statements, in the perjury field" (*Senate Hearings*, *supra*, at 389).

Senator McClellan, on behalf of the Subcommittee, responded shortly after Mr. Wilson's testimony with a letter noting the Justice Department's criticism of the limited scope of Section 1623 and proposing a change in the language of that Section to solve that problem. Senator McClellan wrote (*Senate Hearings*, *supra*, at 409):

> You also read Title IV not to cover "pre-trial depositions, affidavits and certifications." This was not our intent in drafting the bill. We had hoped that it would be applicable, for example, to situations such as [the] kind of pre-trial depositions that the enforcement of S. 1861 would present. If we included in the statute the phrase "proceedings before or ancillary to any court or grand jury" do you feel that this intent would be adequately expressed?

In response, the Department of Justice agreed that the inclusion of the proposed language would have the effect that the Committee intended. *Senate Hearings*, *supra*, at 411.[5]

The committee reports embody this understanding and reflect that by covering proceedings "ancillary to" a court or grand jury, Congress intended to include, for example, pretrial deposition hearings. See

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[5] The "pre-trial depositions" mentioned in Senator McClellan's letter apparently referred to depositions for use in civil proceedings under 18 U.S.C. 1962, which were proposed as part of S. 1861, 91st Cong., 1st Sess. (1969).

S. Rep. No. 91-617, *supra*, at 145, 149; H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 42 (1970). The reference to pretrial depositions in the committee reports was not meant to be exhaustive; in both reports pretrial depositions were listed as only an example of the kind of ancillary proceedings that were meant to be included. In light of the statement in Senator McClellan's letter that it was the intent of the Committee in drafting the bill to cover "affidavits and certifications" as well as pretrial depositions, and in light of the adoption of statutory language designed to cover those situations, it is proper to include within the reach of the statute affidavits or sworn statements such as that given by petitioner on September 30.

If there were any doubt that petitioner's September 30 sworn statement was made in a proceeding that was ancillary to a court, that doubt is dispelled by the fact that the statement was submitted to the court with petitioner's knowledge and that petitioner specifically reaffirmed the statement under oath at the October 21 hearing. Thus, even if the September 30 proceeding could be said to be independent of the Musgrave criminal action as of September 30, it plainly became ancillary to a court when the statement was introduced and adopted by petitioner in open court (with the consequence that the felony charges against Musgrave had to be reduced to one misdemeanor count). The indictment therefore properly charged petitioner with having made one of his two inconsistent declarations in the September 30 sworn statement.

B. Petitioner's Conviction Cannot Be Sustained on the Theory that it Was the Product of a Non-prejudicial Variance

The court of appeals held that even though, in its view, the September 30 statement was not made in a proceeding ancillary to a court, petitioner's conviction should nonetheless be affirmed. The court concluded that because the October 21 hearing was held before a court and thus was clearly within the ambit of 18 U.S.C. 1623, and because petitioner adopted his September 30 statement at that hearing, the disparity between the charge in the indictment and the proof at trial that would have supported a conviction was merely a "variance." The variance was tolerable in this case, the court further concluded, because it did not prejudice petitioner. Moreover, because "it cannot be said that Dunn could not have anticipated that [the evidence of the October 21 hearing] would be presented against him at his perjury trial," the court held that the failure of the indictment to refer to that hearing did not render the indictment insufficient (A. 76).

We disagree with the court of appeals that petitioner's conviction can be affirmed if the Court concludes that the September 30 statement was not made in a proceeding ancillary to a court. Yet while we agree with petitioner that the conviction cannot be sustained on the ground set out by the court of appeals, we reach that conclusion by a different route. Petitioner argues (Br. 13-19) that the

court of appeals both amended the indictment and sanctioned a fatal variance between the charges in the indictment and the proof at trial. But the infirmity in the court's ruling does not fall comfortably within either of these categories. Instead, as we view the case, after the court of appeals concluded that the September 30 statement was not made in a proceeding ancillary to a court, it improperly held that petitioner could be convicted of a charge that was neither alleged in the indictment nor submitted to the jury.

1. *The indictment was not amended*

An indictment is amended when the court or the prosecutor makes a change in the language of the indictment. Amending indictments was strictly prohibited at common law, see *Ex parte Bain*, 121 U.S. 1 (1887), and even today it is generally said that an indictment may be amended only as to matters of form, see *Russell* v. *United States*, 369 U.S. 749, 770 (1962). The purpose of the rule against amending indictments is to protect the defendant's Fifth Amendment right to be indicted by a grand jury. If the indictment is materially amended, the defendant is forced to trial on charges different from those returned by the grand jury, which in effect permits him to be tried on an indictment brought by the prosecutor rather than by the grand jury. See *Stirone* v. *United States*, 361 U.S. 212, 217 (1960).

When a court submits a case to the jury on a theory different from that set out in the indictment, the effect of the court's action may be treated as a constructive amendment to the indictment, even though there is no formal change in the indictment's language. In such cases, the reviewing court must inquire whether the theory on which the case was submitted to the jury differed with respect to an essential element of the offense and in a manner not fairly comprised within the charge returned by the grand jury. *Stirone* v. *United States*, *supra*, 361 U.S. at 218-219.[6]

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[6] Although the Court stated in *Stirone* (361 U.S. at 217) that the strict prohibition against amendments to indictments, as set forth in *Ex parte Bain*, *supra*, has never been disapproved, it is plain that the rule is no longer as rigid as it was at common law. The courts uniformly permit indictments to be amended when the effect of the amendment is to withdraw one or more of the charges from the jury or otherwise to narrow the charges against the defendant. See *Salinger* v. *United States*, 272 U.S. 542, 548-549 (1926); *United States* v. *Prior*, 546 F.2d 1254, 1257 (5th Cir. 1977); *United States* v. *Holt*, 529 F.2d 981 (4th Cir. 1975); *United States* v. *Cirami*, 510 F.2d 69 (2d Cir.), cert. denied, 421 U.S. 964 (1975); *United States* v. *Dawson*, 516 F.2d 796 (9th Cir.), cert. denied, 423 U.S. 855 (1975). See 8 *Moore's Federal Practice* ¶ 7.05 [3] (2d ed. 1978).

In addition, although with less uniformity, courts have sanctioned amendments or "constructive amendments" to indictments to remove surplusage, including allegations that require the government to prove more than is required under the statute at issue. See *United States* v. *Cirami*, *supra*; *United States* v. *McCrane*, 527 F.2d 906, 912-913 (3d Cir. 1975), cert. denied, 426 U.S. 906 (1976); *United States* v. *Harvey*, 428 F.2d 782 (9th Cir. 1970). Courts have also permitted amendments to alter the date of the offense, *Stewart*

In this case, the indictment was not amended at any point in the proceedings. Petitioner was tried and convicted on the same charges that were returned by the grand jury. Neither the prosecutor nor the court in any way altered those charges before trial or before verdict, and the jury was properly instructed wholly in accordance with the allegations in the indictment. It is therefore incorrect to state that the error committed by the court of appeals was to "amend" the indictment, since the objection to amending an indictment is that the charge as submitted to the petit jury is different from the charge as returned by the grand jury. If the fact-finder is given the case on the basis of the original indictment, as here, there is no fatal "amendment." See *Heisler* v. *United States*, 394 F.2d 692, 696 (9th Cir. 1968).

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v. *United States*, 395 F.2d 484, 487-489 (8th Cir. 1968); the serial number of a gun, *United States* v. *Neff*, 525 F.2d 361, 363 (8th Cir. 1975); the nature of the proceeding at which the defendant was alleged to have obstructed justice, *United States* v. *Fruchtman*, 421 F.2d 1019 (6th Cir.), cert. denied, 400 U.S. 849 (1970); and the name of the defendant, *United States* v. *Denny*, 165 F.2d 668 (7th Cir. 1947), cert. denied, 333 U.S. 844 (1948). But see *United States* v. *Huff*, 512 F.2d 66, 69 (5th Cir. 1975) (technical error in name of drug cannot be cured by amendment); *United States* v. *Critchley*, 353 F.2d 358 (3d Cir. 1965) (permitting government to prove offense occurred on a different day from that alleged in the indictment constitutes impermissible amendment). None of these amendments or "constructive amendments" would have been permitted at common law. See Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149, 1174-1176 (1960).

2. *There was no variance between the charges in the indictment and the proof at trial*

A variance arises when the evidence offered at trial proves facts different from those alleged in the indictment. *Berger* v. *United States*, 295 U.S. 78, 81 (1935); *Gaither* v. *United States*, 413 F.2d 1061, 1071-1072 (D.C. Cir. 1969). Unlike an amendment of the indictment, which is reversible error except in limited circumstances, a variance is subject to the application of the harmless error rule, Fed. R. Crim. P. 52(a), and thus results in reversal only if it affects the defendant's substantial rights. *Berger* v. *United States*, *supra*, 295 U.S. at 82: *Kotteakos* v. *United States*, 328 U.S. 750 (1946); *United States* v. *Schrenzel*, 462 F.2d 765 (8th Cir.), cert. denied, 409 U.S. 984 (1972); *United States* v. *Antonelli*, 439 F.2d 1068 (1st Cir. 1971); *United States* v. *Evans*, 398 F.2d 159 (3d Cir. 1968).[7]

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[7] The traditional distinction between variances and amendments has caused great confusion, as a number of courts have observed. See, *e.g.*, *United States* v. *Dawson*, 516 F.2d 796, 801-804 (9th Cir.), cert. denied, 423 U.S. 855 (1975); *United States* v. *Cirami*, 510 F.2d 69 (2d Cir.), cert. denied, 421 U.S. 964 (1975); *Heisler* v. *United States*, 394 F.2d 692, 695-696 (9th Cir. 1968) ("the progeny of *Bain* are out of joint"). In an appropriate case, we believe that this Court should reconsider these doctrines and the principles governing their application.

Amendments are said to offend the interest in ensuring that a defendant is tried for the offense with which the grand jury charged him, while variances are assessed in light of the concern that the defendant not be subject to unfair surprise or to the possibility of further prosecution for the same offense. However, the first two interests are implicated by both

Petitioner argues (Br. 18) that there was a fatal variance in this case between the charge and the proof. The trial court permitted a variance, he contends, when it admitted evidence relating to the October 21 evidentiary hearing, and the court of appeals "committed a prejudicial variance in looking to the

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amendments and variances, since each involves a disparity between the charges returned by the grand jury and the proof introduced at trial. The third interest does not seem significantly implicated by either amendments or variances, since the entire record of a proceeding is referred to in determining whether a defendant is being placed twice in jeopardy for the same offense. See *Russell* v. *United States*, *supra*, 369 U.S. at 764; *Bartell* v. *United States*, 227 U.S. 427, 433 (1913); *Dunbar* v. *United States*, 156 U.S. 185, 191 (1895).

In light of the substantial conceptual overlap between amendments and variances and the congruity of the interests protected by the two doctrines, it is difficult to understand why the standards for reversal should be different, depending upon whether a particular case is characterized as presenting an amendment or a variance. If anything, amendments should be the preferred course for countenancing a disparity between the proof at trial and the charge brought by the grand jury, since an amendment at least gives advance notice of the disparity. Yet under the present state of the law, amendments are judged more strictly: an amendment, actual or "constructive" (*i.e.*, charging the jury in terms different from those in the indictment), is cause for automatic reversal, unless the amendment falls within one of the several narrow exceptions to the strict prohibition set down in *Ex parte Bain*, *supra*; a variance is cause for reversal only if it affects the defendant's substantial rights. See *Berger* v. *United States*, *supra*. In our view, both doctrines should be subject to the same analysis to determine whether the error is prejudicial or harmless and whether there is such a departure from the charge returned by the grand jury as to constitute a substantial abrogation of the Fifth Amendment right to indictment.

[October 21 hearing] in concluding that Dunn had 'admitted he lied to the grand jury'" (Br. 19).

There is no question that the evidence of the October 21 hearing was properly admitted at trial. It was admissible under any theory of the case to show that the September 30 statements were not the product of any mistake or inadvertence and that petitioner knew his testimony before the grand jury and in the September 30 statement were inconsistent (see Tr. 86-87). Moreover, under our interpretation of the statute, which was adopted by the trial court, the evidence of the October 21 hearing was admissible to show that when petitioner adopted his September 30 statement at that hearing, the September 30 proceeding became "ancillary to [a] court" for the purposes of Section 1623(c). For neither purpose was it necessary specifically to allege or refer to the October 21 hearing in the indictment.

The indictment was sufficient for purposes of Fed. R. Crim. P. 7(c) because it alleged all the elements of the offense with which petitioner was charged and in particular specified that the September 30 statement was made in a proceeding ancillary to a court. It was not necessary for the indictment further to allege the legal theory under which the government would assert that the September statement was ancillary to a court or the evidence that the government would adduce to show that petitioner knew his sworn statements were inconsistent. See *Hamling* v. *United States*, 418 U.S. 87, 117-118 (1974); *Giordanello* v. *United States*, 357 U.S. 480,

483 (1958); *United States* v. *Debrow*, 346 U.S. 374, 377-378 (1953); *United States* v. *Gibson*, 513 F.2d 978, 979 (6th Cir. 1976); *United States* v. *Addonizio*, 451 F.2d 49, 58-59 (3d Cir. 1971), cert. denied, 405 U.S. 936 (1972).

In short, there was no variance at trial because the evidence proved precisely what was alleged in the indictment. Rather, what the court of appeals did was to reject the legal sufficiency of the charges as alleged in the indictment and proved at trial, but then to uphold petitioner's conviction on a different theory—one that was not alleged in the indictment or presented to the petit jury. If petitioner had been charged with making inconsistent statements before the grand jury and before a court on October 21, the evidence at trial would have supported a jury verdict against him. But that was not the charge on which he was tried. Thus, while the court of appeals' affirmance of petitioner's conviction on that theory does not constitute an amendment of the indictment or a variance in the proof, it does offend the principle that an appellate court cannot affirm a defendant's conviction on charges of which the jury did not find him guilty. See *Cole* v. *Arkansas*, 333 U.S. 196 (1948). See also *Eaton* v. *City of Tulsa*, 415 U.S. 697, 699 (1974); *Garner* v. *Louisiana*, 368 U.S. 157, 163-164 (1961); *De Jonge* v. *Oregon*, 299 U.S. 353, 362 (1937).

To be sure, in this case the difference between the theory on which the indictment was based and the theory

on which the court of appeals affirmed the conviction is a purely technical one. The evidence introduced at trial would support a conviction on either theory, and it is inconceivable that the jury's verdict would have been any different if it had been asked to determine whether his statement on October 21, adopting his September 30 statement, was inconsistent with his grand jury testimony, instead of being asked to determine whether his September 30 statement itself was inconsistent with his grand jury testimony. Nonetheless, if the court of appeals is correct that petitioner's September 30 statement was not made in a proceeding ancillary to a court, we believe that petitioner must be given an opportunity to contest his guilt of the different charges of making inconsistent statements before the grand jury and on October 21, no matter how confident the court of appeals may be that the jury would come to the same result in that case.

We emphasize, once again, that we disagree with the court of appeals' conclusion that petitioner's September 30 statement was not made in a proceeding ancillary to a court. But if the Court disagrees with us on that point, we believe that petitioner's conviction would have to be reversed.

II.

PETITIONER'S IMMUNIZED GRAND JURY TESTIMONY WAS PROPERLY INTRODUCED AGAINST HIM IN HIS FALSE DECLARATIONS PROSECUTION

The question of more general importance in this case is whether immunized testimony can be used in a false declarations prosecution for the purpose of showing its inconsistency with subsequent, non-immunized testimony. We note preliminarily that, even if the Court determines that petitioner's conviction must be reversed on the ground that the September 30 statement was not made in a proceeding ancillary to a court, petitioner will be subject to reindictment for making inconsistent statements before the grand jury and at the October 21 hearing.[8] Accordingly, we believe the Court should reach the second and more important question presented by

[8] Petitioner contended in his reply to our memorandum in response to his petition for certiorari (Rep. Br. 3) that his October 21 testimony was not inconsistent with his grand jury testimony and that it therefore could not support a prosecution under 18 U.S.C. 1623(c). He has not made that argument in his brief on the merits, but in any event the contention is incorrect. As is reflected in the portion of the October 21 hearing quoted at pages 6-7, *supra*, petitioner took the stand specifically to affirm the truth of his September 30 statement. It would be pointless, as well as contrary to the purpose of the prohibitions against false swearing, to require that petitioner repeat from the stand each of the declarations in the statement he had just affirmed in order to subject him to a perjury or false declarations prosecution for making those declarations in a proceeding before a court.

this case regardless of how it resolves the first question.

In this case, petitioner was compelled to testify before a federal grand jury on the subject of illicit drug dealings in the Colorado prison system. He plainly had sufficient exposure to possible prosecution for those criminal activities to justify invoking his Fifth Amendment privilege and refusing to testify about them. Petitioner testified only after being immunized against the use of his testimony to incriminate him, and, as we discuss below (pages 39-41, *infra*), the posture of this case is such that petitioner must be given the benefit of the assumption that his compelled testimony was truthful.

No one disputes that the immunity petitioner obtained in return for his compelled testimony precludes the government from making either direct or derivative use of that testimony to convict him of complicity in the drug offenses that were the subject of his testimony. The question here is whether he also acquired immunity from the use of that testimony to prove a later offense (here, perjury) that was neither imminent nor even contemplated at the time the privilege was invoked and the immunity conferred.

In the argument that follows, we contend that neither the Constitution nor the immunity statute, 18 U.S.C. 6002, prevents the use made in this case of petitioner's immunized testimony. This conclusion follows inevitably if the Court agrees with the following propositions:

(1) The scope of the immunity conferred in overriding an invocation of the privilege is precisely coextensive with the right of non-incrimination enjoyed by the witness at the time the testimony is compelled; and

(2) A witness may not properly invoke the privilege against compulsory self-incrimination to refuse to answer questions before a grand jury on the ground that he may subsequently decide to give contrary testimony and does not wish his grand jury testimony to be available as evidence of the falsity of that testimony.

We now turn to establishing the correctness of these two propositions.

A. The Fifth Amendment Permits the Use of Immunized Testimony to Prove the Falsity of Subsequent, Non-Immunized Testimony

1. *Introduction*

If this were an ordinary prosecution for perjury in which the issue was simply whether petitioner's testimony before the grand jury was false, there would be no doubt that his immunized grand jury testimony could be used against him. The Court has always permitted prosecutions for perjury committed under a grant of immunity, even when the immunity statute in question contains no express exception for perjury. See, *e.g.*, *United States* v. *Wong*, 431 U.S. 174, 178 (1977); *United States* v. *Washington*, 431 U.S. 181, 189 (1977); *United States* v. *Mandujano*, 425 U.S. 564, 577-578 (1976) (plurality opinion);

id. at 584-585 (Brennan, J., concurring in the result); *id.* at 609 (Stewart, J., concurring in the result); *Glickstein* v. *United States*, 222 U.S. 139 (1911).[9]

This case is not governed by that settled principle, however, because of the method of proof used at trial. As we have noted, the government relied on the "inconsistent declarations" method of proving a false declarations offense. See 18 U.S.C. 1623(c). Under this method of proof, the government can establish a violation of the false declarations statute by showing that the defendant made two inconsistent sworn statements in proceedings before or ancillary to a grand jury or a court; there is no need to prove which of the two statements is false. The jury was properly instructed on this method of proof (A. 57-58), and it must be presumed that the verdict was based simply on the inconsistency between the grand jury testimony and the statements sworn to on September 30. Thus, unlike the situation in cases like *Glickstein*, the government was not using immunized testimony solely to prove its falsity, and the jury's verdict of guilty did not necessarily mean that the

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[9] It is less clear how much of the immunized testimony may be introduced in such a prosecution. At least those portions alleged to be false may be used. See *United States* v. *Anzalone*, 555 F.2d 317, 320 (2d Cir. 1977); *United States* v. *Patrick*, 542 F.2d 381, 385 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977); *United States* v. *Hockenberry*, 474 F.2d 247, 249 (3d Cir. 1973) (en banc). The question whether other relevant portions may be used to prove that the charged portions are false is before the Court in *United States* v. *Apfelbaum*, petition for cert. pending, No. 78-972.

jury had concluded that petitioner's grand jury testimony was false.

For this reason, we disagree with the rationale employed by the court of appeals to sustain the use of petitioner's grand jury testimony. The court of appeals first noted, correctly, that a grant of immunity protects only truthful testimony. It then ruled that because petitioner had subsequently stated that his grand jury testimony was false, that admission provided a sufficient basis for applying the principle that false immunized testimony cannot be used against the witness (A. 79-80). We believe that this approach would ordinarily be appropriate in cases in which the prosecution seeks to use the immunized testimony only for its falsity. See *United States* v. *Moss*, 562 F.2d 155 (2d Cir. 1977), cert. denied, 435 U.S. 914 (1978); cf. *United States* v. *Kahan*, 415 U.S. 239 (1974); *United States* v. *Tramunti*, 500 F.2d 1334 (2d Cir.), cert. denied, 419 U.S. 1079 (1974). Here, however, the prosecution did not necessarily rest on the theory that petitioner's immunized grand jury testimony was false; the jury may well have concluded that the grand jury testimony was true and the subsequent recantation false, or that because the statements were irreconcilably inconsistent, it was unnecessary to determine which one was false. In view of those possibilities, petitioner's statement that his grand jury testimony was false does not, by itself, justify the use of that testimony against him.

In order to sustain the conviction in this case, it is necessary to conclude that petitioner's immunized grand jury testimony could be used against him even if it was truthful. Although we disclaim reliance on the rationale of the court of appeals, we nonetheless submit that it reached the correct result and that neither the Constitution nor the immunity statute bars the use of even truthful immunized testimony to establish a subsequent perjury.

2. *A grant of immunity must be as broad as, but need not be broader than, the privilege it displaces*

The Fifth Amendment privilege against compulsory self-incrimination protects a person against being compelled to testify when he reasonably believes his testimony could incriminate him. *Kastigar* v. *United States*, 406 U.S. 441, 445 (1972). The privilege is available only if the witness's answer to a particular question would expose him to a substantial and real danger of incrimination; if the testimony could not incriminate him, or if the threat of incrimination is merely speculative or remote, the privilege may not be invoked. See *Marchetti* v. *United States*, 390 U.S. 39, 53 (1968); *Hoffman* v. *United States*, 341 U.S. 479, 486-487 (1951); *Rogers* v. *United States*, 340 U.S. 367, 373-375 (1951); *Mason* v. *United States*, 244 U.S. 362, 365-367 (1917); *Heike* v. *United States*, 227 U.S. 131, 144 (1913); *Brown* v. *Walker*, 161 U.S. 591, 599-600 (1896).[10]

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[10] This standard is commonly traced to the English case of *Regina* v. *Boyles*, 121 Eng. Rep. 730, 738 (Q.B. 1861) (Cockburn, C. J.) ("the danger to be apprehended must be

Even when a witness makes a valid assertion of the privilege, he can be compelled to testify if the government grants him immunity in exchange for his testimony.[11] Testimony can constitutionally be compelled under a grant of immunity as long as the immunity removes the danger against which the privilege protects. In order to substitute for the privilege, the immunity must be co-extensive with the privilege that it supplants, but it need not be any broader. *Kastigar* v. *United States*, *supra*, 406 U.S. at 449, 453; *Murphy* v. *Waterfront Commission*, 378

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real and appreciable * * * not a danger of an imaginary and unsubstantial character"). See VIII J. Wigmore, *Evidence* § 2260 (McNaughton rev. 1961).

Moreover, the determination whether the risk of incrimination is sufficiently great to warrant the protection of the privilege is not left to the witness, but must be made by a court if the witness's invocation of the privilege is challenged. *United States* v. *Mandujano*, 425 U.S. 564, 575 (1976) (plurality opinion); *Hoffman* v. *United States*, *supra*, 341 U.S. at 486-487; *Mason* v. *United States*, *supra*, 244 U.S. at 366; *United States* v. *Burr*, 25 F. Cas. 38, 39-40 (C.C. Va. 1807) (No. 14,692e) (Marshall, C. J.); *In re Pillo*, 11 N.J. 8, 19-20, 22, 93 A.2d 176, 181-183 (1952) (Brennan, J.).

[11] Granting immunity has long been recognized as an appropriate means of accommodating the right of the public to demand every man's evidence and the right of the individual not to be forced to incriminate himself by his testimony. The historical background of immunity or "indemnity" statutes is traced in *Kastigar* v. *United States*, *supra*, 406 U.S. at 443-446. See also L. Levy, *Origins of the Fifth Amendment* 328-329, 384-404 (1968); VIII J. Wigmore, *Evidence*, *supra*, at § 2281; Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 Yale L.J. 1568 (1963).

U.S. 52, 54, 78 (1964); *Brown* v. *Walker*, 161 U.S. 591, 595, 610 (1896).

3. *The privilege, and thus the immunity granted in its place, ordinarily does not extend to crimes the witness may commit in the future*

Because a witness is not entitled to assert his Fifth Amendment privilege with respect to speculative risks of incrimination, he ordinarily is not permitted to assert the privilege on the basis of crimes he might commit in the future. Thus, even if his testimony would provide the government with information that could prove useful in prosecuting him for offenses that he might commit after testifying, he ordinarily cannot refuse to testify on that ground. See *United States* v. *Freed*, 401 U.S. 601, 606-607 (1971); *id.* at 611-612 (Brennan, J., concurring); *United States* v. *Bryan*, 339 U.S. 323, 340-341 (1950); *Glickstein* v. *United States*, 222 U.S. 139, 142 (1911); *United States* v. *Tramunti*, 500 F.2d 1334, 1344 (2d Cir. 1974).

In *Marchetti* v. *United States*, *supra*, the Court declined to apply a rigid distinction between past and future offenses in determining whether the privilege is available. The Court noted that "prospective acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination" (390 U.S. at 54). Nonetheless, it declined to apply that general principle to the case of a professional gambler engaged in a continuing course of illegal conduct and faced with a registration scheme designed primarily for law enforcement purposes. In those circum-

stances, the Court concluded, the risk of incrimination with respect to future acts was sufficient to justify upholding the claim of privilege.[12]

The subsequent decision in *United States* v. *Freed*, *supra*, made it clear that the Court in *Marchetti* did not mean to discard the distinction between past and future crimes in testing the availability of privilege. To the contrary, the Court in *Freed* reaffirmed the past-future distinction and the principle that the privilege cannot be asserted to protect against incrimination for future crimes. *Freed* thus suggests that *Marchetti* may be limited to cases in which the privilege is asserted to avoid a substantial and nonspeculative risk of incrimination for future acts that are part of an ongoing criminal enterprise.[13]

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[12] The Court also upheld the claim of privilege on the ground that the registration and tax payment requirements at issue in the case posed substantial hazards of incrimination with respect to Marchetti's current and past activities, because "satisfaction of those requirements increases the likelihood that any past or present gambling offenses will be discovered and successfully prosecuted" (390 U.S. at 52).

[13] The risk of incrimination in both *Freed* and the present case is vastly different both in kind and degree from the risk of incrimination facing Marchetti. The statute at issue in *Marchetti* required professional gamblers to acquire a federal gambling tax stamp, which in turn required "the declaration of a present intent to commence gambling activities" and thus obliged "even a prospective gambler to accuse himself of conspiracy to violate either state gambling prohibitions, or federal laws forbidding the use of interstate facilities for gambling purposes." 390 U.S. at 53. Petitioner's compelled grand jury testimony, by contrast, did not in any way require him to declare a present intent to commit perjury. Petitioner's grand jury testimony became incriminating evidence of a false declarations offense only when he later determined to give sworn testimony contrary to the testimony he gave before the grand jury. Thus, the compelled disclosure in *Marchetti* could help incriminate the registrant even if he never took steps to commit any further gambling offenses. Petitioner's grand jury testimony, by contrast, cannot realistically be said to have been incriminating with respect to its truth or falsity until the time that, by his own devices, he managed to make it so.

In *Freed*, the Court upheld the provision of the National Firearms Act that requires a detailed report to be filed upon the transfer of certain classes of firearms. The Act provides that the information furnished in the report could not be used against either party to the transfer with respect to any present or past criminal acts. The defendant argued that even though the information in the transfer registration forms could not be used to incriminate him for present or past acts, it could be used in connection with any unlawful acts he might commit in the future and that the statutory immunity was therefore insufficient to displace the privilege. The Court rejected that argument, concluding that the threat of incrimination with respect to offenses the defendant might commit in the future was not "substantial and 'real' " (401 U.S. at 606). The defendant's argument, the Court held (401 U.S. at 606-607),

> assumes the existence of a periphery of the Self-Incrimination Clause which protects a person against incrimination not only against past or present transgressions but which supplies insulation for a career of crime about to be launched. We cannot give the Self-Incrimination Clause such an expansive interpretation.

The Court therefore held that the statutory immunity from the use of the registration materials to prove any past or current crimes was sufficient to overcome the defendant's assertion of his Fifth Amendment privilege.[14]

In his concurring opinion, Mr. Justice Brennan expanded on this point, noting that the privilege "does not require that immunity be given as to the use of such information in connection with crimes that the transferee might possibly commit in the future with the registered firearm." *United States* v. *Freed*, *supra*, 401 U.S. at 611 (Brennan, J., concurring). The immunity in the statute, prohibiting the use of information obtained in the registration forms with respect to past crimes, is "coextensive with the privilege" (401 U.S. at 612), Justice Brennan concluded, and the information can therefore lawfully be compelled without violating the privilege against compulsory self-incrimination.

The past-future distinction is supported not only by the inherent speculativeness that attends most claims of possible future incrimination, but also by consideration of the policies that underlie the constitutional privilege. The privilege is in essence a shield designed to protect an actual or potential criminal defendant from having the government pry from his lips statements that could be used to convict

[14] The Court also noted that, unlike the information in *Marchetti*, the information on the transfer form was not ordinarily made available to state and federal law enforcement agencies, 401 U.S. at 606, and for that reason as well, the defendant's fear of incrimination was insubstantial.

him of crime. *Murphy* v. *Waterfront Commission*, *supra*, 378 U.S. at 55. It is the product of a judgment by the Framers that the distastefulness of inquisitorial practices designed to produce a suspect's confession outweighs the value to the criminal justice process of requiring an accused to account for his actions.

As applied to a future offense, however, the privilege becomes a sword rather than a shield, and the balance of interests is quite different. At the time he is granted immunity, a witness's testimony ordinarily cannot incriminate him with respect to a crime he has not yet committed. Thus, the effect of immunizing the witness from the use of his testimony to prove a subsequent offense is simply to permit the individual to commit that crime free of the risk that his prior testimony can be used to convict him. There is nothing in the laudable policies underlying the privilege that would justify this kind of extension of its sweep.

4. *Petitioner's receipt of immunity did not bar the use of his testimony to prove the falsity of his subsequent sworn statements*

In this case, of course, petitioner did not invoke the privilege on grounds of possible incrimination as to any future offense; rather, he presented a valid claim of privilege based upon the risk of incrimination as to already consummated offenses. Petitioner contends that upon making a legitimate claim of the privilege, he acquired a comprehensive immunity

against any prospective use whatsoever of truthful testimony given under compulsion.

a. We submit that the immunity acquired is not so all-encompassing, but instead is precisely co-extensive with the scope of the privilege available to the witness at the time the testimony was compelled. The Constitution does not require that the grant of immunity protect a witness from dangers that fall outside the protection of the privilege. *Ullmann* v. *United States*, 350 U.S. 422, 430-431, 438-439 (1956); *Heike* v. *United States*, 227 U.S. 131, 142-143 (1913); Korman, *The Use of Testimony Compelled Under a Grant of Use Immunity*, 44 Brooklyn L. Rev. 935, 940 (1978).[15] Thus, the legitimacy of any proposed use of the compelled testimony can be ascertained by determining whether, at the time he was called upon to give that testimony, the witness could successfully have invoked his privilege to guard against that use. If he could, then by compelling the testimony over a claim of the privilege, the government forgoes the ability to make that use of the testimony. On the other hand, if the use that the government proposes to make of the immunized testimony could not have been adduced as a valid basis for claiming the privilege, the immunity does not protect against that use.

[15] For example, a witness cannot assert the privilege to escape liability in a civil suit, or disgrace in the community, or even the loss of a job or some other non-criminal sanction. *Gardner* v. *Broderick*, 392 U.S. 273, 279 (1968); *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation*, 392 U.S. 280, 284-285 (1968); VIII J. Wigmore, *Evidence*, *supra*, at §§ 2254-2255. He cannot even assert the privilege because he fears for his life if he testifies. *Piemonte* v. *United States*, 367 U.S. 556, 559 n.2 (1961). It is therefore unnecessary for the grant of immunity to protect against those consequences in order to displace the privilege. *Ullmann* v. *United States*, *supra*, 350 U.S. at 430-431; *Smith* v. *United States*, 337 U.S. 137, 147 (1949); *Brown* v. *Walker*, *supra*, 161 U.S. at 605-606.

In the present case, as we have noted, petitioner was privileged to decline to testify with regard to drug dealings at the Colorado State Penitentiary. For that reason, the grant of immunity under which his grand jury testimony was compelled precludes the use of his testimony or its fruits to help convict him of any of the activities about which he was questioned.

Similarly, if petitioner had previously given a false sworn statement about the matters as to which he was questioned before the grand jury, he could validly have asserted his privilege not to testify because of the risk that his truthful testimony before the grand jury would expose him to a prosecution for perjury or false declarations. See *United States* v. *Housand*, 550 F.2d 818, 823 (2d Cir.), cert. denied, 431 U.S. 970 (1977). For that reason, a grant of immunity would protect him from the use of his testimony to prove the prior perjury. *In re Grand Jury Proceedings*, 509 F.2d 1349, 1351 (5th Cir. 1975); *United States* v. *Watkins*, 505 F.2d 545, 546 (7th Cir. 1974); *United States* v. *Alter*, 482 F.2d 1016, 1028 (9th Cir. 1973).

On the other hand, if petitioner had declined to testify on the ground that his truthful answers before the grand jury would be incriminating should he

later choose to give materially inconsistent testimony, his claim of privilege would not have been sustained. See *Kronick* v. *United States*, 343 F.2d 436, 441 (9th Cir. 1965). In effect, his claim would have been that without the protection of the privilege he would not be as free to perjure himself in the future, since he would be subject to prosecution for making a statement inconsistent with his grand jury testimony. This impediment to his ability to perjure himself in the future is not a "real danger of legal detriment arising from the disclosure." *Rogers* v. *United States*, 340 U.S. 367, 372-373 (1951). A possible future act of perjury, even a planned one, is not the kind of criminal exposure that the privilege against compulsory self-incrimination was intended to reach. The Self-Incrimination Clause does not extend "insulation for a career of crime about to be launched" (*United States* v. *Freed*, *supra*, 401 U.S. at 607), even if the "career" is one of perjury.[16]

[16] This Court's decision in *Cameron* v. *United States*, 231 U.S. 710 (1914), is not to the contrary. In that case, the defendant was indicted for perjuring himself in two related bankruptcy proceedings. The prosecution sought to use his testimony in the first proceeding to prove that his testimony in the second was false, and vice versa. The Court held that this was improper under the applicable immunity statute. Although the statute authorized prosecutions for perjury committed under a grant of immunity, it prohibited the use of any immunized testimony "in any criminal proceeding." The Court construed the statute to permit the government to use the allegedly false statements in each proceeding to prove perjury in that proceeding, but not to use the statements to prove perjury in the other proceeding. The Court made it clear that its opinion was based on a construction of the applicable immunity statute, and not on any constitutional prohibition. See 231 U.S. at 721, 724.

Accordingly, because petitioner in this case could have expected no protection from his Fifth Amendment privilege for a possible future act of perjury, it follows that there is no constitutional barrier to the use of his immunized grand jury testimony, even if truthful, to establish the falsity of his subsequent inconsistent testimony.[17]

b. Relying on language in *Kastigar* v. *United States*, *supra*, 406 U.S. at 458-459, and *Murphy* v. *Waterfront Commission*, *supra*, 378 U.S. at 79, petitioner argues (Br. 22) that his immunized testimony cannot be used "in any respect" and that the Constitution requires that the immunity order leave him "in substantially the same position as if he had remained silent."

Petitioner's construction of the language from *Murphy* and *Kastigar* is far too broad. In stating that the government could not use testimony compelled under a grant of immunity "in *any* respect" (406 U.S. at 453; emphasis in original), the Court in *Kastigar* was distinguishing between "use and de-

[17] Our argument is significantly different from that made by the State in *New Jersey* v. *Portash*, No. 77-1489, argued December 5, 1978. In *Portash*, the State seeks to use the defendant's immunized testimony to impeach his testimony at his subsequent trial for the substantive offenses about which he had testified before the grand jury. Thus, in that case, the imumnized testimony would be employed to help the State establish the defendant's guilt of the same crime as to which he initially claimed the privilege and as to which his privilege was overriden by a grant of immunity. In the instant case, by contrast, the immunized testimony is being used to prove a crime that had not occurred at the time petitioner was granted immunity and as to which he then had no testimonial privilege.

rivative use" immunity, which it held constitutionally sufficient, and the more limited "use" immunity that was held insufficient in *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892). In order for the immunity to be commensurate with the privilege, the Court stated in *Kastigar*, the government must be denied not only the right to use compelled testimony as evidence at trial, but also the right to use the testimony to develop leads and strengthen its case against the defendant in indirect ways.

This is a far cry, however, from petitioner's sweeping claim that immunized testimony can never be used against the witness, or that the grant of immunity must put him in the same position he would have been in if he had remained silent. As we have noted (see page 48, *supra*), immunized testimony can be used for a number of purposes: it can be used to prove that the testimony was perjured; it can be used against the witness in civil proceedings; and it can be used to deny the witness a job or other important benefits that he might have continued to enjoy had he remained silent. It is therefore inaccurate to say that the grant of immunity prohibits the government from making any use whatever of the compelled testimony.

What *Murphy* and *Kastigar* in fact establish is that the Constitution prohibits the use of compelled testimony for any purpose as to which a claim of privilege would be upheld. Thus, an immunized witness may be prosecuted for testifying falsely under a grant of immunity because, if he had claimed the

privilege on the ground that he might lie before the grand jury, his claim would have been rejected and he could have been required to testify without immunity. In other words, an immunity grant provides the same protection against prosecution for contemporaneous perjury that the privilege does: that is, no protection at all.

Similarly, if petitioner had refused to testify before the grand jury on the ground that his testimony might be used to incriminate him if he should choose to perjure himself in some future proceeding, his claim of privilege would have been rejected, and petitioner would have been required to testify. He is therefore in the same position that he would have been in if he had invoked his privilege on that ground and his claim had properly been denied. To grant petitioner any broader protection would depart from the principle that the scope of the immunity must be equal to, but ought not be greater than, the scope of the privilege.

This point is perhaps best underscored by comparing the protection that petitioner would have obtained under the previous system of transactional immunity with the protection that he is claiming in this case. A grant of transactional immunity provides the witness protection from prosecution for any offense about which he is required to testify. Even under transactional immunity, however, the witness enjoys no protection with respect to testimony as to which he could have asserted no privilege.

In *Heike* v. *United States*, *supra*, for example, the government granted transactional immunity to a witness in an antitrust investigation. The witness was later indicted on tax fraud charges only remotely related to the matters at issue in the antitrust investigation. The Court held that the portions of his grand jury testimony that related to the fraud charges were not incriminating, and that the witness could not have made a valid claim of the privilege with respect to that testimony. Therefore, the Court held, the witness's immunity provided no protection against his subsequent prosecution for tax fraud.

Similarly, in *People* v. *Woodson*, 309 Mich. 391, 15 N.W.2d 679 (1944), a case very similar to this one except that it arose under a transactional immunity statute, the court held that the defendant's immunized grand jury testimony could be used to prove a later act of perjury. The transactional immunity statute protected the defendant against prosecution for any offense concerning which his testimony might tend to incriminate him, the court held, but the immunity did not extend to a later act of perjury because his immunized testimony did not relate to that offense at the time it was given.

The Court in *Murphy* and *Kastigar* clearly did not intend to suggest that use immunity is broader in any respect than transactional immunity. Accordingly, the statements in those cases that immunized testimony may not be used in "any way" must be interpreted to apply only to uses that the witness

could have avoided by a timely assertion of the privilege.

c. Petitioner relies (Br. 27) on dicta from several court of appeals opinions to support his argument here. Both *United States* v. *Berardelli*, 565 F.2d 24 (2d Cir. 1977), and *United States* v. *Patrick*, 542 F.2d 381 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977), were appeals by witnesses who had been held in contempt for refusing to testify, despite a grant of immunity. In both cases, the witnesses gave as their ground for insisting upon their privilege against compulsory self-incrimination in the face of the immunity grant the fear that their answers, if inconsistent with prior testimony they had given, might be used to convict them of making false declarations under the inconsistent statements theory of 18 U.S.C. 1623(c). In *United States* v. *Housand*, 550 F.2d 818 (2d Cir.), cert. denied, 431 U.S. 970 (1977), a prospective defense witness who had earlier testified before the grand jury under a grant of immunity refused, in the absence of a new grant of immunity, to testify at trial. The witness's refusal was upheld by the district court, and the defendant challenged the correctness of that ruling on appeal.

The contempt convictions of Patrick and Berardelli were affirmed, while Housand's claim was rejected. Each opinion explicitly, although unnecessarily and with little supporting analysis, stated that no incriminating use of any kind could be made of truthful immunized testimony, even to prove a later

perjury. See also *United States* v. *Apfelbaum*, 584 F.2d 1264 (3d Cir. 1978), petition for cert. pending, No. 78-972. Thus, the courts each stated that it would violate the witness's Fifth Amendment privilege to use statements he made under a grant of immunity to prove that he later gave inconsistent testimony while not immunized.

The results in *Berardelli*, *Housand*, and *Patrick* were correct without regard to their dicta and are not inconsistent with the result in this case. In each of those cases, the witness, having previously testified, was called to testify on the same subject a second time. In each case, he invoked his privilege on the ground that truthful testimony on the second occasion might tend to establish the falsity of his prior testimony, thereby incriminating him. Each invocation of the privilege was plainly proper and foreclosed the compulsion of testimony without a grant of immunity. In each instance, moreover, the grant of immunity would have precluded the use of the testimony at the second appearance to establish the falsity of the prior testimony, whether pursuant to an inconsistent statements theory or otherwise. Since this is so, there was no necessity for the courts to express any view about the use that might be made of any immunized testimony, truthful or otherwise, given during an earlier appearance.

In the instant case, by contrast, petitioner's second, inconsistent testimony was volunteered. He could have invoked his privilege to refuse to give that testimony without a grant of immunity, but he did not do so. Accordingly, there was here no potential for

the use of compelled, immunized testimony against petitioner to incriminate him with respect to prior unlawful conduct. *Berardelli*, *Housand*, and *Patrick* thus afford no substantial support for petitioner's objection to the use of his immunized grand jury testimony against him in this false declarations prosecution.

B. The Federal Immunity Statute Does Not Prohibit the Use of Truthful, Immunized Testimony to Prove the Falsity of Subsequent, Non-immunized Testimony

Petitioner argues (Br. 23-30) that even if the use of his immunized testimony that was allowed in this case does not violate the Fifth Amendment, it is nevertheless prohibited by the federal immunity statute, 18 U.S.C. 6002. Petitioner concedes, as he must, that the plain language of the immunity statute permits the use of immunized testimony in a prosecution for perjury or giving a false statement. But he argues that the language of the statute is meant to apply only to perjury or false statement prosecutions in which the government has charged that the false statement was made during immunized testimony.

It is beyond dispute that the statutory reference to prosecutions for "giving a false statement" includes prosecutions brought under 18 U.S.C. 1623, the federal false declarations statute.[18] See *United*

[18] Petitioner suggests otherwise (Br. 26), but as we shall show, the legislative history of the Act makes it clear that the reference to "false statements" was intended to encompass "false declarations" prosecutions brought under 18 U.S.C. 1623.

States v. *Anzalone*, 555 F.2d 317 (2d Cir. 1977). Petitioner can therefore prevail on the statutory issue only if the immunity statute was intended to exclude those false declarations prosecutions in which the government proceeds under the inconsistent declarations method of proof authorized by subsection (c) of Section 1623. The legislative history of the immunity statute reveals no congressional intent to carve out an exception for that type of false declarations prosecution.

1. ***The legislative history of the immunity statute shows that Congress intended to provide only such immunity as is constitutionally required***

The immunity statute applicable to this case, 18 U.S.C. 6002, was enacted as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, Section 201(a), 84 Stat. 927. It was drafted in response to a reexamination of the constitutional principles applicable to immunity, prompted in part by the decision in *Murphy* v. *Waterfront Commission*, *supra*, which indicated that current federal immunity statutes that granted broad transactional immunity provided more protection than was required by the Constitution. See *Kastigar* v. *United States*, *supra*, 406 U.S. at 452 & n.36. In both the Senate and House reports on the proposed legislation, it was made clear that the purpose of the new provision was to narrow the scope of a grant of immunity to precisely what the Constitution requires, and no more:

> This statutory immunity is intended to be as broad as, but no broader than, the privilege against self-incrimination. * * * It is designed to reflect the use-restriction immunity concept of *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964) rather [than] the transaction immunity concept of *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892).

S. Rep. No. 91-617, *supra*, at 145; H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 42 (1970). See also S. Rep. No. 91-617, *supra*, at 107-108 (comments of Department of Justice).

The proposal for the federal use immunity statute derived from a 1969 report of the National Commission on the Reform of the Federal Criminal Laws. See II *Working Papers of the National Commission on Reform of Federal Criminal Laws* 1445-1448 (1970). The report proposed a general federal use immunity statute under which "the immunity conferred would be confined to the scope required by the fifth amendment" (*id.* at 1405). See also *Senate Hearings*, *supra*, at 326.

The statements of the sponsors of the bill, like the comments in the House and Senate Reports, reflect a general understanding that the bill would restrict immunity to the scope required by the Constitution. Senator McClellan, the chief sponsor of the bill in the Senate, emphasized that the bill was designed to provide only the minimum required immunity. "Giving immunity where it is not necessary," he stated, "is giving an unnecessary gratuity to a crime, a step

no sane society ought ever to take." 115 Cong. Rec. 5879 (1969).[19] Representative Poff, the chief sponsor in the House, observed that the bill would give a witness "all that is guaranteed him under the Constitution" (116 Cong. Rec. 35291 (1970)). Quoting Mr. Justice White's observation in *Murphy* v. *Waterfront Commission*, *supra*, 378 U.S. at 107, he added that "'[i]mmunity must be as broad as, but not harmfully and wastefully broader than, the privilege

[19] The language of the statute proposed by the Commission was largely similar to that found in the present statute. The pertinent portion of the Commission's proposal read (II *Working Papers*, *supra*, at 1447):

> [N]either the testimony nor other compelled disclosures of the witness, nor any information or evidence derived therefrom, shall be used against the witness in any criminal case, except a prosecution for perjury or any other offense constituting a failure to comply with such direction.

The initial draft of S. 30, the bill that ultimately became the Organized Crime Control Act of 1970, contained a somewhat different immunity provision. Like the Commission's proposal, it provided for use and derivative use immunity rather than transactional immunity. But, among other differences, it contained a narrower description of the cases in which immunized testimony could be used than the Commission's proposal. The initial S. 30 provision prohibited the use of immunized testimony in any proceeding "other than in connection with a prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section." S. 30, 91st Cong., 1st Sess. (1969), reprinted in *Senate Hearings*, *supra*, at 14. At the suggestion of the Department of Justice, that provision was discarded in favor of the Commission's proposal. With minor language changes, the Commission's proposal was introduced as S. 2122 and was ultimately incorporated as part of the Act. See S. Rep. No. 91-617, *supra*, at 55.

against self-incrimination'" (116 Cong. Rec. 35291 (1970)).

These legislative materials make it clear that Congress did not intend to grant any broader protection to an immunized witness than is required by the Constitution. The statute therefore should not be construed, as petitioner seeks, to impose an additional and more stringent limitation on the uses to which immunized testimony may be put.

Finding the legislative history "unclear," petitioner argues (Br. 24-25) that the wording of the last clause of the immunity statute suggests a narrow construction of the uses to which immunized testimony may be put. That clause prohibits the use of immunized testimony in any criminal case "except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the [immunity] order." Because the last of these specified exceptions starts with the words "or otherwise," petitioner argues that Congress must have intended all the exceptions to be limited to cases in which the witness has failed to comply with the order, either by testifying falsely or by refusing to testify at all. See *United States* v. *Berardelli*, *supra*, 565 F.2d at 29; *United States* v. *Patrick*, *supra*, 542 F.2d at 385-386; *United States* v. *Alter*, 482 F.2d 1016, 1028 (9th Cir. 1973).

While that is certainly a plausible interpretation of the statutory language,[20] it is not a necessary one.

[20] As petitioner correctly points out, the government has endorsed that construction previously. See *United States* v.

In light of the strong indication in the legislative history that Congress meant to permit the use of immunized testimony to the extent permissible under the Constitution, and in light of the unpalatable result that petitioner's construction produces in cases such as this, we submit that the statute should not be given such a restrictive construction.

The fact is that the exceptions clause was not added for the purpose of limiting the use to which immunized testimony could be put. The list of exceptions was added for quite the opposite reason: to forestall a construction that would unnecessarily restrict the uses to which immunized testimony could be put. As both the Senate and House reports stated: "The exception for perjury, false statements or other failure to comply with the order is probably unnecessary. * * * It is included out of caution to insure that such immunity is not given." S. Rep. No. 91-617, *supra*, at 145; H.R. Rep. No. 91-1549, *supra*, at 42. Congress thus assumed, in accordance with decisions of this Court, that the ostensibly restrictive language of use immunity statutes would not preclude uses of immunized testimony that are not inconsistent with the Constitution. See *United States* v. *Bryan*, *supra*, 339 U.S. at 338-340; *Heike* v. *United States*, *supra*, 227 U.S. at 141; *Glickstein* v. *United States*, *supra*.

In both *Glickstein* and *Bryan*, the Court construed immunity statutes to permit uses of immunized testimony consistent with the Constitution, but not specified in the pertinent immunity statute. In *Glick-*

Alter, *supra*. We now believe, for the reasons given here, that the position advanced in *Alter* is incorrect.

stein, the Court construed a statute that prohibited the use of immunized testimony "in any criminal proceeding" to permit its use in a prosecution for perjury (222 U.S. at 143), and in *Bryan*, the Court construed an immunity statute that prohibited the use of immunized testimony "in any criminal proceeding against [the witness] in any court, except in a prosecution for perjury committed in giving such testimony" to permit the use of immunized testimony in a prosecution for contempt (339 U.S. at 342). The Court in those cases observed that the term "in any criminal proceeding" was added " 'only from superfluous caution and throws no light on the construction.' " *United States* v. *Bryan*, *supra*, 339 U.S. at 342; *Glickstein* v. *United States*, *supra*, 222 U.S. at 143.

Because the "exceptions" clause in Section 6002, like the even narrower exceptions clauses in *Bryan* and *Glickstein*, was inserted solely as a precaution against a restrictive reading of the statute, the clause should not be read to impose restrictions on the use of immunized testimony that would not have been imposed in its absence. For that reason, the term "criminal case" in Section 6002 should be construed to refer to criminal prosecutions for or relating to the conduct about which the witness testified, not to any criminal prosecution that may be brought for misconduct committed by the witness in the course of his testimony or afterwards.[21] See *United States* v. *Tramunti*, *supra*.

[21] Petitioner's construction of the statute would produce anomalous results. For example, under petitioner's construc-

2. *Prosecutions under Section 1623 were intended to be among the prosecutions for "giving a false statement" under the immunity statute*

Petitioner contends that although the statute permits the use of immunized testimony in a conventional perjury or false statements prosecution, it prohibits the use of immunized testimony in a false declarations case based upon the inconsistent statements theory of Section 1623(c). Even if petitioner can overcome the manifest intent of Congress that the immunity statute should not be construed to restrict any use of immunized testimony that is permissible under the Constitution, his contention nevertheless fails because the legislative history of the false declarations statute, 18 U.S.C. 1623, demonstrates that the use of immunized testimony in a false declarations prosecution is permissible even when the government uses the "inconsistent declarations" method of proof.

The false declarations statute, 18 U.S.C. 1623, like the federal use immunity statute, was enacted as part of the Organized Crime Control Act of 1970.[22] It was designed to make false swearing easier to prove by doing away with several common law rules of evidence that traditionally had applied to prosecu-

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tion, if a witness committed a crime in the grand jury room, such as offering the grand jurors a bribe, the testimony that constituted the offense could not be introduced against him, even though the Constitution would plainly not forbid that use.

[22] The immunity provisions were contained in Title II of the Act, while the false declarations statute was contained in Title IV. Pub. L. No. 91-452, Section 401(a), 84 Stat. 932.

tions under the federal perjury statute, 18 U.S.C. 1621. In order to facilitate prosecutions for false swearing before or ancillary to a grand jury or a court, Congress therefore made the common law rules such as the two-witness rule and the direct-evidence rule inapplicable to prosecutions under Section 1623. This step, it was thought, would result in "greater assurance that testimony obtained in grand jury and court proceedings will aid the cause of truth." S. Rep. No. 91-617, *supra*, at 57-59; see also H.R. Rep. No. 91-1549, *supra* at 33. In addition, in order further to ease the traditional difficulties faced by the prosecution in perjury cases, Congress provided that contradictory statements under oath could supply the basis for a perjury prosecution without specific proof of the falsity of one of the statements. 18 U.S.C. 1623(c); S. Rep. No. 91-617, *supra*, at 58.

One of the main reasons that Congress sought to facilitate prosecutions for false swearing was to provide meaningful sanctions to ensure that immunized testimony would be truthful. See S. Rep. No. 91-617, *supra*, at 58. In explaining the liberalized provisions for proving a false declarations offense, Senator McClellan observed (115 Cong. Rec. 5880 (1969)):

> A subpena can compel the attendance of a witness before a grand jury or at trial. An immunity grant can displace his privilege against self-incrimination. The threat of imprisonment for civil contempt can legitimately coerce him into testifying. But only the possibility of a perjury prosecution, or some related sanction,

can provide any guarantee that his testimony will be truthful.

Similarly, during the debate in the House, Representative Poff emphasized that the provisions in the statute facilitating the proof of false declarations would be equally applicable to prosecutions involving immunized testimony (116 Cong. Rec. 35292 (1970)):

> The integrity of the criminal trial depends upon the power to compel truthful testimony and to punish falsehood. Witness immunity such as title II will provide can be an effective prosecutive weapon only if the immunized witness testifies truthfully. The infrequency of the use of perjury sanctions—due to the difficulty of securing convictions under existing law—has limited the effectiveness of established criminal sanctions for false statements under oath.

Thus, far from intending to exclude the use of compelled testimony in false declarations prosecutions, Congress was concerned with guaranteeing the truthfulness of all types of formal testimony, including that of immunized witnesses, when it introduced the liberalized proof provisions embodied in Section 1623.[23] The fact that the language of the immunity

[23] Petitioner's argument (Br. 26) that the cases cited in the legislative history concern only the traditional type of perjury such as that prohibited by 18 U.S.C. 1621, and that Congress therefore must have intended an exception no broader than that allowed by earlier statutes, is plainly flawed. Because Congress was only then enacting the new false declarations statute, there were obviously no cases interpreting the previously nonexistent offense. What is far more significant is that when Congress decided to add the new false declarations statute to the Act, it added parallel language to the proposed immunity statute referring not only to "perjury," but to "giving a false statement" as well. See page 60, note 19, *supra*.

statute makes no specific reference to a prosecution based on the inconsistent statements theory of proof is neither surprising nor significant. The immunity statute plainly was intended to permit the use of immunized testimony to prove a false declarations offense. The inconsistent statements theory is simply an alternative method of proving a violation of that statute, and it could hardly be expected that it would be mentioned separately from (and redundantly to) the false declarations offense with which it is associated.

The basic reason for the traditional rule that the government can prosecute a witness for lying under a grant of immunity applies as well to cases in which the witness makes subsequent sworn statements inconsistent with his grand jury testimony. Perjured testimony is, of course, worthless to the grand jury. Therefore, if there is no effective sanction for perjury, the grand jury cannot be reasonably assured of getting useful testimony in exchange for the immunity granted to the witness. Similarly, if an immunized witness gives one story in the grand jury room and a contrary story at trial or in some other proceeding, his recantation frustrates the purpose of the grant of immunity just as much as if he had originally lied or refused to testify. Once the witness claims under oath that his previous sworn testimony

was untrue, it no longer matters which statement is true and which is false. The value of his testimony is impaired as effectively as if he had given two contradictory answers to the grand jury in response to every question.[24] Under petitioner's theory, unless the government has some reliable way of proving which of his two statements was false, he is free to repudiate his grand jury testimony with impunity. That, we submit, was not what the Congress that passed the false declarations and use immunity statutes had in mind.

For these reasons, we submit that it is not justified in this case to ignore the plain language of the immunity statute, which permits the use of immunized testimony in a prosecution, such as this one, for "giving a false statement."

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[24] Although it would require a particularly brazen witness to engage in such a practice, his situation would not be materially different from petitioner's. If petitioner is correct that the government cannot employ the inconsistent statements theory of proof to show that one of his two statements was false, the same argument would apply to the witness who gave two contradictory answers to every question. The argument, identical to petitioner's, would be that neither statement can be used because either may be true, even though it is clear that both are not. Thus, unless the government could establish by independent evidence that one of the statements was in fact false, it would have no way to punish the witness in spite of the fact that he, like petitioner here, would indisputably have perjured himself.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 77-6949

ROBERT DUNN, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

I

THE SEPTEMBER 30 "CANGES STATEMENT" WAS NOT MADE IN A PROCEEDING ANCILLARY TO A COURT.

The U. S. Tenth Circuit Court of Appeals agreed with Dunn's contention that the "Canges Statement" was not made in a proceeding ancillary to a U. S. court or grand jury under 18 U.S.C. §1623. It ruled as follows:

> "This court has concluded that while the Canges statement is 'ancillary,' in the sense that it is connected to and had an effect upon the grand jury proceeding, the event occurring in Canges' office, in and of itself, is not a 'proceeding' within the meaning of the statute so as to be a proceeding ancillary to a grand jury proceeding. Despite the administration of the oath and presence of the notary public, we hold that the event lacks the degree of formality the statute requires." (A. 75) (Emphasis added.)

Respondent has taken issue with this finding and argues as follows:

> "Section 1623 does not define the term 'proceeding * * * ancillary to any court,' but the legislative history of the statute suggests that the term was included in the statute to bring within the reach of the statute statements such as affidavits, depositions, and certificates prepared for use in conjunction with a court proceeding. The September 30 proceeding clearly fit within the description. Petitioner's statement was taken in connection with the criminal proceeding against Musgrave and for use in that proceeding, a use in which petitioner actively participated by testifying at the October 21 evidentiary hearing and reaffirming the truth of his sworn statement. Accordingly, petitioner's September 30 statement was made in a proceeding ancillary to a court."

(Emphasis added.) (Brief for United States, p. 13-14).

Petitioner agrees that the legislative history suggests that a deposition falls within the purview of an ancillary proceeding under §1623 but disagrees that an affidavit or certificate by itself qualifies. Furthermore, Respondent asks this Court to find ancillariness by looking to the October 21st hearing, a proceeding not charged in the indictment.

Respondent argues that the legislative history of §1623 supports its conclusion that affidavits and certificates are included within the definition of ancillary proceedings before a U. S. court or grand jury. In support, it cites a letter from the Justice Department expressing concern that the draft of proposed Section 1623 excluded from its provisions pre-trial depositions, affidavits, and certificates, as well as, administrative and legislative hearings or proceedings. Senate Hearings on S.30, 91st Cong., 1st Sess. at 372, 379-380. Senator McClellan responded as follows:

> "You also read Title IV not to cover 'pre-trial depositions, affidavits and certifications.' This was not our intent in drafting the bill. We had hoped that it would be applicable, for example, to situations such as [the] kind of pre-trial depositions that the enforcement of S.1861 would present. If we included in the statute the phrase 'proceedings before or ancillary to any court or grand jury' do you feel that this intent would be adequately expressed?" (Emphasis added.) Senate Hearings at 409.

Respondent has concluded that Senator McClellan's response evidenced an intent to include "affidavits and certifications." (Brief for the United States, p. 26). Petitioner submits that a plain reading of the Senator's letter indicates an intent to include pre-trial depositions and nothing more. In a footnote Respondent further concludes that the Senator, in alluding to pre-trial depositions, must have been referring to "depositions for use in civil proceedings under 18 U.S.C. 1962, which was proposed as part of S.1861, 91st Cong., 1st Sess. (1969)." (Footnote, Brief for the United States, p. 25). It is also reasonable to assume that Senator McClellan was referring to the provision for pre-trial depositions in criminal cases which was part of S.30, the Organized Crime Control Act of 1970, P.L. 91-45, 84 Stat. 934. Senator McClellan introduced S.30 on January 14, 1969, and referred to his sponsorship in introducing S.1861. Vol. 115, Part 7, Congressional Record, p. 9566.

Under the Organized Crime Control Act, Congress created a procedure for taking pre-trial depositions of prospectively unavailable witnesses in pending federal criminal cases. Title 18, United States Code, Section 3503. The purpose of the new provision was to preserve testimony of a prospective witness whenever "due to exceptional circumstances it is in the interest of justice" that it be taken and preserved. 18 U.S.C. §3503(a). A deposition is to be taken only upon court order and the requesting party must give reasonable written notice of the time and

place of its taking. 18 U.S.C. §§3503(a) and (b). No motion was ever filed by attorney Canges or any other party to the Musgrave proceeding, no notice was given to the other parties, and no court order was entered authorizing a deposition.

Though §3503 modifies Rule 15 of the Federal Rules of Criminal Procedure, the new provision was intended to "reflect present practice under rule 15." U. S. Code Congr. and Admin. News, 91st Cong., 2nd Sess. 1970, Vol. 2, p. 4025. Under Rule 15, a "deposition may not be used if it was not taken pursuant to an order of the court and no notice was given to the parties." United States v. Polizzi, 500 F.2d 856, 891 (9th Cir. 1974) cert. den. 419 U.S. 1120; Mims v. Central Mfrs. Mnt. Ins., 178 F.2d 56, 59 (5th Cir. 1949).

Furthermore, Dunn's unavailability for trial or other proceedings was never demonstrated.[1] The document was not attested to be his statement (other than in later testimony), it was not reviewed and signed by him [See Rule 30(e), Federal Rules of Civil Procedure; Rogers v. Roth, 477 F.2d 1154, 1159 (10th Cir. 1973)], it was not recorded by other

---

[1] "In order for a defendant to obtain a deposition, he must show each of the following:
(1) that it appears that a prospective witness may be unable to attend or prevented from attending the trial or hearing; (2) that the witness' testimony is material; and (3) that it is necessary to take his deposition 'in order to prevent a failure of justice.'" 8 Moore's Federal Practice 2d Ed., §15.02, p. 15-5 quoted in United States v. Massi, 277 F.Supp. 371, 373 (W.D. Ark. 1968).

than stenographic means with the approval of the court [See Rule 30(b)(4), Federal Rules of Civil Procedure], and it was not certified and filed with the court as required by Rule 30(f), Federal Rules of Civil Procedure.

When Dunn testified at the October 21st evidentiary hearing, even then, he had not reviewed the entire statement for accuracy.[2]

Plaintiff's Exhibit 2 was not a deposition at all but merely a purported transcription of a tape recording taken in Canges' office. (Plaintiff's Exhibit 2 and 3, R. Supp. Vol. I).[3] On voir dire examination, Mr. Cohen admitted

---

[2] "Q Mr. Dunn, have you had occasion to review that certain transcript or affidavit of the conversation or colloquy that transpired on September 30th?

A Yes, sir, all but about the last five or ten pages." (A. 46).

[3] Q Now, sir, inviting your attention to September 30, 1976, did you at the request of Michael Canges have occasion to take a statement or affidavit from a man named Robert Dunn?

A Yes.

* * *

Q Was Mr. Dunn wearing a microphone the day you took it?

A That's correct.

Q Did you cause that later to be typewritten, put in typewritten form?

A Yes, I did.

Q And did you supervise that?

A Yes, I did.

Q Did you review the typewriting afterwards, and compare it to the tape recording?

A Yes.

Q Were there any changes, additions or deletions of stuff on the tape recording that you later put into

that he was not familiar with and had not followed federal deposition procedures for criminal cases.[4]

[footnote continued]

the affidavit?

A I don't understand your question.

Q Well, I'm sorry. That wasn't very clear. Did you change or delete anything when you transcribed it to writing?

A No.

Q Do you have the recording with you?

A Yes, I do.

MR. NOTTINGHAM: At this point, then, Your Honor, I would offer Exhibit 2, Plaintiff's Exhibit 2.

THE COURT: Your position, please?

MR. SEARS: I would ask for voir dire, Your Honor.

(R. Vol. II, p. 23-26).

[4]Cohen testified as follows:

Q Mr. Cohen, are you aware of the judicial qualifications established for court reporters by the United States Judicial Conference?

A Are you making reference to the Rules of Procedure?

Q I am relating specifically to the statement of judicial qualifications for certified court reports in federal courts, as promulgated by the United States Judicial Conference. Are you aware of such regulations?

A No, sir.

Q You are not? Have you ever received an appointment as an official court reporter for and by the United States District Court for the District of Colorado?

A No, sir.

Q Are you paid by the Judicial Conference of the United States?

A Directly, no. On occasion, yes.

Q Do you know the guidelines and requirements for the maintenance of record-keeping systems set down by the Judicial Conference of the United States?

A No.

Q Is your salary fixed by the Judicial Conference of the United States?

To assure the truthworthiness of a deponent's testimony, a defendant's right of confrontation must be preserved, the statements must be under oath and recorded, and the entire procedure must be under the authority and general supervision of the trial court. United States v. King, 552 F.2d 833, 840 (9th Cir. 1976) cert. den. 430 U.S. 966.

[footnote continued]

A No.

Q Are you aware of the statutory procedure for taking a deposition in a criminal case in federal courts under Title 18, United States Code, Section 3503?

A No.

Q Did you take the defendant before the Court and have him advised of his rights, as required under subsection (c) of Title 18, United States Code, Section 3503?

A No.

Q Did he have an attorney of his own choosing present when the statement before you was taken?

A May I review the transcript for a minute?

Q If you will, please.

A Would you repeat your question, please?

Q Did Mr. Dunn have an attorney of his own choosing present when the statement was taken before you?

A No, he did not.

Q You did not take him before the Court for appointment of counsel, is that correct?

A That's correct.

Q Did you give notice to any other parties to the pending case before the United States District Court for the District of Colorado of the taking of a statement from Mr. Dunn?

A No, sir.

Q Was there any indication made to you that Mr. Dunn would not be available for the Musgrave trial, or other exigent circumstances communicated which justified your taking of the statement outside of the court proceedings?

A No, sir.

(R. Vol. II, p. 26-28).

See California v. Green, 399 U.S. 149 (1970). Dunn was not represented by his own counsel who had an opportunity to cross-examine and he did not testify at the inconsistent declarations trial. "As amended, the section [3503] makes clear that the Government's right to obtain a deposition shall not infringe the defendant's rights under the fifth amendment." U. S. Code Congr. and Adm. News, 91st Cong., 2nd Sess., 1970, Vol. 2, p. 4026.

Had Dunn's statement been authorized and obtained pursuant to 18 U.S.C. §3503, it seems clear that its taking could be deemed to have occurred during an ancillary proceeding. The legislative history to the immunity provisions of the Organized Crime Control Act reads as follows:

> "Section 6002 contains the basic immunity from self-incrimination granting authorization. Proceedings before or ancillary to grand juries, courts, agencies of the United States, or before either House of Congress, Joint committees, committees or subcommittees thereof are covered. A pretrial deposition hearing for example, would be ancillary to a court proceeding. (See Senate Hearings at p. 409, 411.)" (Emphasis added.) U. S. Code Congr. and Adm. News, 91st Cong. 2nd Sess. 1970, Vol. II, p. 4017.

Respondent argues that the Krogh and Stassi cases support its contention that the Canges statement qualifies as an ancillary proceeding. United States v. Krogh, 366 F.Supp. 1255 (D.D.C. 1973); United States v. Stassi, 583 F.2d 122 (3rd Cir. 1978).

The bases for the court's ruling in Krogh that the "deposition" taken in the offices of the U. S. Department

of Justice was a proceeding ancillary to the Watergate Grand Jury is not set out in the opinion. Whether the Department of Justice followed §3503 procedures is not known. Nevertheless, the court seems to place great significance in the fact that Krogh, himself a lawyer with the advice of counsel, was aware of the nature of the proceedings and was "fully informed as to that fact in advance." Krogh at p. 1256. In Stassi, the affiant made certain declarations before the court in Rule 11 proceedings and subsequently declared matters inconsistent in an affidavit in support of a §2255 action. There is no question the Rule 11 statements were made before the court. The affidavit submitted with the 2255 motion poses a more difficult question. Affidavits in support of a habeas action are normally prepared for the court's preliminary determination as to whether an evidentiary hearing should be held. Dalli v. United States, 491 F.2d 758 (2nd Cir. 1974). It seems clear that §2255 proceedings themselves are to be considered proceedings before or ancillary to a U. S. court. However, where affidavits in support or opposition are not considered to be a part of the records of the case, it is questionable whether the court's ruling in Stassi that statements contained therein were declarations in an ancillary proceeding under §1623 is justified. Machibroda v. United States, 368 U.S. 487, 494-495 (1962); Crispo v. United States, 443 F.2d 13 (9th Cir. 1971). The affidavit alone is no substitute for testimony in establishing factual issues before the court. See Sciberras

v. United States, 404 F.2d 247 (10th Cir. 1968); Smith v. United States, 338 F.Supp. 1216 (D.C. Tenn. 1972); Close v. United States, 310 F.Supp. 240, 242 (D.C. Va. 1970).

Respondent further contends that the Canges statement would have been prosecutable under 18 U.S.C. §1621 "if the government had been able to prove that the contents of that statement were actually false rather than merely irreconcilably inconsistent with his grand jury testimony." (Brief for the United States, p. 22). It cites United States v. D'Amato, 507 F.2d 26, 29 (2nd Cir. 1974); United States v. Birrell, 470 F.2d 113 (2nd Cir. 1972); Ely Valley Mines, Inc. v. Lee, 385 F.2d 188 (9th Cir. 1967) and Butler v. McKey, 138 F.2d 373 (9th Cir. 1943) cert. den. 321 U.S. 780 (1944) in support of its contention that false swearing in an affidavit authorized to be filed in a judicial proceeding violates Section 1621. Whether the filing of a false affidavit or certificate is violative of §1621 is not determinative of whether the document qualifies as a proceeding before or ancillary to a court.

18 U.S.C. §1621, perjury generally, concerns false affidavits, certificates and declarations where a person has taken an oath before a competent tribunal, officer or person authorized by federal law to administer it. Section 1623, on the other hand, requires that false or inconsistent declarations be made in a "proceeding before or ancillary to any U. S. Court or grand jury." The language of §1623 is more restrictive than §1621. A false declaration under §1623 may be prosecuted under §1621, as well, but the

converse is not necessarily true. §1623 requires a proceeding before or ancillary to a U. S. court or grand jury; §1621 requires only that the matter be under oath before "a competent tribunal, officer or person." (Emphasis added.) Whether Dunn could be prosecuted under §1621 does not resolve the question of whether the requirements of §1623 were fulfilled.

The burden of proof for inconsistent declarations under §1623(c) is less substantial than proof of perjury under §1621. The traditional two-witness rule is not applied in §1623(c) prosecutions. United States v. Diggs, 560 F.2d 266 (7th Cir. 1977) cert. den. 434 U.S. 925. Petitioner suggests that the two-witness rule may have been relaxed under §1623 but maintained under §1621 because of the inherent protections of a proceeding before or ancillary to a U. S. Court or grand jury. Many of the less formal proceedings covered by §1621 don't carry the same indicia of reliability or truthworthiness. See Rule 804(b)(2), Federal Rules of Evidence.

Respondent further contends that any affidavit "prepared for use in connection with a court proceeding" is covered by §1623 and argues that Dunn "actively participated" in such preparation by testifying at the October 21 hearing. (Brief for the United States, p. 14). Petitioner submits that Dunn's actions at the October 21st hearing are not at issue since that event was not charged in the indictment as being an ancillary proceeding in which inconsistent declarations were made. The September 30 Canges

affidavit, by itself, must qualify as an ancillary proceeding under §1623 or the conviction must be set aside. The indictment charged inconsistent declarations before a grand jury on June 16, 1976, and in a proceeding ancillary to Musgrave on September 30, 1976 (A. 3-11). The declarations alleged to be inconsistent were drawn from only those two proceedings. The October 21, 1976, proceeding was not pled in the indictment, was not provided to the defense in advance of trial under Rule 16 and was not even contemplated as evidence in the government's case-in-chief.[5]

Respondent, in effect, justifies sustaining petitioner's conviction by adopting a process similar to that utilized by the appellate court and criticized by Respondent.

"We disagree with the court of appeals that petitioner's conviction can be affirmed if the Court concludes that the September 30 statement was not made in a proceeding ancillary to a court. Yet while we agree with petitioner that the conviction cannot be sustained on the ground set out by

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[5]MR. NOTTINGHAM: Your Honor, as to the first issue of Rule 16, Mr. Sears is perfectly correct, he didn't receive this transcript until today. I had not intended to introduce this as part of the Government's case in chief. However, I did not anticipate that the Court would permit Mr. Sears to cross-examine Mr. Snow to the extent it did, to the effect of establishing that Mr. Dunn's testimony before the grand jury was in fact true. That is to rebut that inference or to deal with that inference, is the reason that I am offering this transcript.

Mr. Dunn in the course of this transcript adopts his statements before Mr. Canges, and once again reaffirms that his testimony before the grand jury was untrue. (R. Vol. II, p. 82-83).

the court of appeals, we reach that conclusion by a different route." (Emphasis added.) (Brief for the United States, p. 27).

Later in its brief, Respondent argued:

"Thus, while the court of appeals' affirmance of petitioner's conviction on that theory does not constitute an amendment of the indictment or a variance in the proof, it does offend the principle that an appellate court cannot affirm a defendant's conviction on charges of which the jury did not find him guilty." (Citations omitted; Emphasis added.) (Brief for the United States, p. 34).

Respondent projects that should Dunn succeed in the instant appeal, he will "be subject to reindictment for making inconsistent statements before the grand jury and at the October 21 hearing." (Brief for the United States, p. 36). In a footnote, it appears that Respondent would proceed on an inconsistent declarations theory based on the grand jury testimony and the October 21 affirmance of the Canges affidavit. Respondent seems to suggest that the September 30 statements "became" declarations in proceedings before a court only after Dunn took the stand October 21. This was also inferred at pages 26, 33, 34 and 35 of Respondent's brief. Petitioner submits that such arguments are incongruous with Respondent's contention that the Canges statement, by itself, was an "ancillary proceeding."

The legislative history reflects that §1623 was intended to "facilitate Federal perjury prosecutions and

establishes a new false declarations provision applicable in Federal grand jury and court proceedings." U. S. Code Cong. and Adm. News, 91st Cong., 2nd Sess. 1970, Vol. 2, p. 4008. Petitioner submits that §1623 must be strictly construed. Bronston v. United States, 409 U.S. 352, 360 (1973). The Canges statement of September 30, 1976, cannot be deemed to fall within the definition of an ancillary proceeding under §1623. As the prosecuting attorney characterized it at trial " . . . [I]t was a private party entirely, entirely a private proceeding . . ." (R. Vol. II, p. 37).

ARGUMENT

II

A RULING THAT A WITNESS' IMMUNIZED TESTIMONY CANNOT BE USED AGAINST HIM IN AN INCONSISTENT DECLARATIONS PROSECUTION DOES NOT PROTECT HIM FROM PUNISHMENT FOR FUTURE CRIMES.

18 U.S.C. §6002 displaces the witness' privilege against self-incrimination and "protects against the use of compelled testimony directly or indirectly against the witness, in a criminal proceeding." (Emphasis added.) U. S. Code Cong. and Adm. News, 91st Cong., 2nd Sess., 1970, Vol. 2, p. 4008. Robert Dunn's testimony was used directly against him in a criminal proceeding without a showing that he violated his immunity order.

Respondent correctly observes that to sustain this conviction, "it is necessary to conclude that Dunn's immunized grand jury testimony could be used against him even if it

was truthful." (Emphasis added.) (Brief for the United States, p. 41).

A. Petitioner seeks no broader application of his immunity grant than the Fifth Amendment privilege which it displaced.

When Dunn appeared before the federal grand jury on June 16, 1976, and claimed his privilege against self-incrimination, he was subsequently compelled to testify with the promise that "no testimony or other information compelled under this order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness ROBERT DWIGHT DUNN in any criminal case, in any court, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this order." (Emphasis added.) (A. 24).

The question is not whether petitioner is protected from prosecution for future crimes, but whether §1623(c) falls under the perjury or false statement exception to the immunity grant.

Dunn's testimony was compelled when his Fifth Amendment privilege was ordered displaced. The immunity grant is as broad as the privilege. The exclusionary rule leaves the witness in substantially the same position as if he had remained silent. Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964). Applied to the facts of the present case, unless Dunn violated the immunity order, the government was left with only the Canges statement and the October 21st testimony as evidence for use against him in its inconsistent

declarations prosecution. Upon Dunn's invocation of his Fifth Amendment privilege, the government had no testimony available for use against him unless it could except it from the immunity order. In United States v. Frumento, 552 F.2d 534, 542-543 (3rd Cir. 1977) the Court opined that it could not be used even for impeachment purposes.

> "Were we to permit impeachment with immunized testimony, we would then be affording the immunized witness something less than his full Fifth Amendment protection.
>
> * * *
>
> We reiterate our adherence to this principle; except as the basis for a prosecution for perjury a witness's immunized testimony may not be used against him." (Emphasis added.) United States v. Frumento at 552 F.2d 543.

The corpus delicti of the §1623(c) prosecution charged in the indictment was the June 16, 1976, grand jury testimony and the September 30, 1976, Canges statement. Unless the federal grand jury testimony was excepted from the immunity order, it was not available for use by the government against Dunn. To except the grand jury testimony from the ordered immunity, the government had to prove that Dunn committed perjury, gave a false statement or otherwise failed to comply with the order (e.g., contempt). (A. 24). If Dunn testified truthfully under immunity, then it cannot be said he committed perjury, gave a false statement or "otherwise failed to comply" with the order. Because he subsequently went to an attorney's office (one not representing his interests) and made inconsistent statements

did not lift the immunity unless the government proved that he breached his immunity bargain. Dunn asks for no more than he was promised and constitutionally guaranteed.

B. Dunn is not protected from prosecution for future crimes.

Dunn's grand jury testimony was not the corpus delicti of a future crime. It was part of the corpus delicti of a criminal case arising from his immunized testimony. The immunity would not have protected Dunn from a perjury prosecution under §1621 or §1623(a) if the government had proved that he lied to the grand jury. This is not because it constitutes the commission of a future crime; it is because perjury or false statement is an exception to the ordered immunity. Furthermore, it would not have protected him from a perjury prosecution had the government proved that he lied in U. S. District Court on October 21, 1976. The government, however, did not attempt to establish either. It chose, instead, the easier route of dispensing with the two-witness rule and proceeding on an inconsistent declarations theory under §1623(c). United States v. Diggs, 560 F.2d 266 (7th Cir. 1977) cert. den. 434 U.S. 925. Mere inconsistency does not prove perjury under immunity. Cameron v. United States, 231 U.S. 710 (1914).

Respondent argues that the Fifth Amendment does not protect a witness from prosecution for future crimes. Petitioner does not disagree. But the promise that he will not have evidence pried from his lips only to be used by the government to convict him must be honored. Murphy

v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

Dunn's risks of self-incrimination on June 16, 1976, were real, not imaginary, when he claimed his privilege against self-incrimination. See United States v. Marchetti, 390 U.S. 39 (1968). He testified, inter alia, that he was involved in illicit speed traffic when he met Phillip Musgrave (A. 26); that Musgrave had drugs in the penitentiary all the time; that he acted as Musgrave's gopher with compensation to be paid in drugs (A. 27); that he helped Musgrave smuggle drugs into the penitentiary (A. 27-29) and that he and Musgrave discussed "how he was going to set up the organization once he got outside." (A. 29).

If Respondent's argument that Dunn, or any other witness similarly situated, is not protected from having his immunized testimony used against him in the prosecution of future crimes, very few witnesses will testify with the assurance that their testimony won't be used against them. See United States v. Frumento, 552 F.2d 534, 542 (3rd Cir. 1977). For example, when Dunn testified about discussing with Musgrave "how he was going to set up the organization once he got outside," such testimony did not immunize Dunn from prosecution for any illegal drug offenses committed in assisting Musgrave set up an organization if it could be proved by independent evidence. What the immunity did confer, however, was the court's assurance that Dunn's testimony would not provide the link in the chain of evidence that might be used to convict Dunn of illegal

activities. "Immunity from the use of compelled testimony, as well as evidence derived directly or indirectly therefrom, affords this protection." (Emphasis added; Kastigar v. United States, 406 U.S. at 453).

Respondent argues that one of the main purposes for enactment of §1623 was to "ensure that immunized testimony would be truthful." (Brief for the United States, p. 65). Yet it argues that immunized testimony should be used against a witness even if truthful to prosecute future crimes. (Brief for the United States, p. 41).

By the government's reasoning, if a witness is called before the grand jury in a misapplication of government funds investigation against a fellow employee, claims his Fifth Amendment privilege on the basis of his own possible culpability (e.g., accessory after the fact, 18 U.S.C. §3) but is compelled to testify under 18 U.S.C. §6002, he will be forever exposed to the use of his compelled testimony against him for anything he does in the future. For example, if he gave the grand jury an account of his own financial situation and a couple weeks later swore to a financial statement at a bank that proved inconsistent, the government could use his compelled grand jury testimony against him to make out a violation under 18 U.S.C. §1014. Petitioner submits that the promise of use immunity is and must be just that--immunity from "use" against the witness in any criminal case except the specified exceptions--perjury, false statement or otherwise violating the order (e.g., contempt).

> "And if immunity that deprived him of that privilege is to be, as constitutionally it must, co-extensive with the privilege itself, his compelled admission of wrongdoing cannot later be used to discredit his effort to defend himself against a charge of some other wrongdoing. 'Immunity from the use of compelled testimony . . . prohibits the prosecutorial authorities from using the compelled testimony in any respect . . .' Powell, J., in Kastigar v. United States, supra, 406 U.S. at 453, 92 S.Ct. at 1661." United States v. Hockenberry, 474 F.2d at 250.

The government's concern for compelled "truthful" testimony can be realized only if a witness knows he or she is protected by the immunity. The immunity order is meant to compel truthful testimony and information "at any proceeding before or ancillary to a court . . . or a grand jury of the United States . . ." 18 U.S.C. §6003. It cannot compel a witness to be truthful for the remainder of his life only to be confronted with the possible inconsistencies should he subsequently falter. United States v. Hockenberry, 474 F.2d 247, 250 (3rd Cir. 1973). See also United States v. Frumento, supra, at 542-543. If the witness lies in proceedings other than those covered by the immunity order, the perjury [18 U.S.C. §§1621 or 1623(a)] must be proved by independent evidence. See United States v. Housand, 550 F.2d 818, 823 (2nd Cir. 1977) cert. den. 431 U.S. 970.

In United States v. Anzalone, 555 F.2d 317 (2nd Cir. 1977) cert. den. 434 U.S. 1015, the Second Circuit held that the bringing of an indictment which sets out false declarations given while under immunity takes those statements

outside the immunity grant and a verdict of guilty establishes that the "declarations were false and, hence, outside the immunity conferred." (Emphasis added.) Anzalone at p. 320. In the present case, the government in its indictment elected to prove inconsistency rather than false declarations while under immunity and, therefore, did not establish that the grand jury testimony was outside the immunity. The petit jury, by its verdict, also did not decide that false declarations were made while under immunity and therefore, did not bring them within the exception to §6002.

Respondent cites People v. Woodson, 309 Mich. 391, 15 N.W.2d 679 (1944) as similar to the case at bar. The court in Woodson held that immunized testimony could be used to prove the falsity of testimony in a later case. However, in Woodson the government was attempting to prove the perjury committed at a time subsequent to the immunized testimony and was not relying on the immunized testimony as part of the corpus delicti of the offense. Petitioner contends that the court's ruling is further distinguishable in that the immunity given Woodson (transactional) protected him from prosecution on any past or present, but not future, substantive offenses about which he testified. Dunn, on the other hand, was promised that his testimony would not be used against him "in any criminal case, in any court, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." (A. 24). 18 U.S.C. §6002. Under the opinions rendered

in several federal cases, any testimony compelled under use immunity could not be used for any purpose except a prosecution for perjury, false statement or other violation of the immunity order. See for e.g., Cameron v. United States, supra; United States v. Berardelli, supra; United States v. Frumento, supra; United States v. Housand, supra. Truthful immunized testimony cannot be used by the government in contravention of the ordered immunity. Cameron v. United States, 231 U.S. 710 (1914); United States v. Hockenberry, 474 F.2d 247 (3rd Cir. 1973).

Respondent argued that this Court's decision in Cameron v. United States, 231 U.S. 710 (1914) is not contrary to its stated position (Footnote, Brief for the United States, p. 50). Petitioner disagrees.

The statute involved in Cameron reads quite similarly to the use immunity provision at issue in the present case:

> "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any Court of the United States, in any criminal proceeding or for the enforcement of any penalty or forfeiture. Provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid." (Emphasis added.)

A comparative analysis of 18 U.S.C. §6002 reveals many similarities in language. In Cameron, this Court held that since the government did not use the immunized testimony

to prove perjury but merely to contradict the testimony given before the referee, its use violated the immunity statute. The court stated:

> "We think to permit the use of the testimony for that purpose was to permit the testimony given in the one instance to be used in a criminal proceeding based upon testimony given in the other instance, and therefore to violate the immunity given in §860 of the Revised Statutes, then in force." Cameron at p. 724.

Though §1623(c) was not in effect at the time of the Cameron decision, the government's method of prosecuting perjury by establishing inconsistency of statements was not much different.

Where a witness testifies truthfully under immunity in one proceeding, petitioner contends that the government cannot use it to obtain a conviction for perjury in another proceeding.

> "A witness' truthful testimony, given under a grant of immunity, may not be used to prove either a later perjury, Cameron v. United States, 231 U.S. 710-718-24, 34 S.Ct. 244, 58 L.Ed. 448 (1914), or, as here, an earlier perjury, United States v. Alter, 482 F.2d 1016, 1028 (9th Cir. 1973)." United States v. Berardelli, 565 F.2d 24, 28 (2nd Cir. 1977).

See United States v. Anzalone, 555 F.2d 317, 320 (2nd Cir. 1977) cert. den. 434 U.S. 1015; United States v. Hockenberry, 474 F.2d 247 (3rd Cir. 1973). This court, however, need not go that far in determining that immunized testimony cannot be used to establish the corpus delicti of an inconsistent declarations prosecution. United States v. Berardelli, supra; United States v. Housand, supra; United States v.

Patrick, supra. Petitioner submits that Respondent's past offense-future offense distinction is inapplicable to §1623(c) since a part of the corpus delicti in the present case was the declarations made under immunity. Unless those statements were shown to be untruthful, they were not removed from immunity protection.

Respondent argues that Petitioner must "overcome the manifest intent of Congress that the immunity statute should not be construed to restrict any use of immunized testimony that is permissible under the Constitution. . ." (Emphasis added; Brief for the United States, p. 64). Petitioner submits that the government's use of Dunn's immunized testimony against him in a criminal case without showing that he committed perjury or made a false statement was not "permissible under the Constitution." Again, the legislative history to Title II, the immunity provisions, reveals that Congress expected that a witness' Fifth Amendment privilege must remain unabridged.

> "It is contemplated that the title will enable effective displacement of the privilege against self-incrimination by granting protection coextensive with the privilege; that is, protection against the use of compelled testimony directly or indirectly against the witness, in a criminal proceeding." (Emphasis added.) U. S. Code Cong. and Adm. News, 91st Cong., 2nd Sess. 1970, Vol. 2, p. 4008.

Petitioner submits that §1623(c) can be reconciled with the Fifth Amendment and the use immunity provisions by holding that immunized testimony cannot be used in any respect except a prosecution for perjury, false statement or other

violations of the immunity order. Kastigar at p. 453. An immunized statement not shown to be untruthful simply will not qualify without violating §6002 and the witness' Fifth Amendment privilege. A statute should be construed so as to avoid a serious question about its constitutionality. See Lynch v. Overholser, 369 U.S. 705, 711 (1962); Int'l Assn. of Machinists v. Street, 367 U.S. 740, 749 (1961).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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